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CONSTITUTIONAL SOURCES OF THE PENUMBRAL RIGHT TO PRIVACY

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ONE OF THE WARREN COURT'S foremost contributions to the ever-evolving heritage of American constitutional law was its "discovery" of the constitutional right to privacy. Certainly, past Courts had spoken on numerous occasions about a "right of privacy."[1] Indeed, during the last two decades the fourth amendment's right to be free from unreasonable searches and seizures had become, in shorthand terminology, "the right to privacy."[2] Occasional decisions in the first[3] and fifth amendment[4] areas had also made reference to such a right. However, it was not until the 1965 decision in *Griswold v. Connecticut*[5] that the issue of constitutional privacy came suddenly to the forefront. Not only was the factual background of the case dramatic, with the state prosecuting a physician for counseling his patients in the use of contraceptives,[6] but the strategy employed by the Court's majority in striking down the Connecticut statute[7] was unique. *Griswold* marks the first occasion upon which the Supreme Court discussed a composite right to privacy, drawing its substance from a number of the Bill of Rights' guarantees in language which appeared to indicate a strong constitutional presumption against any manner

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1. *See, e.g.*, Lanza v. New York, 370 U.S. 139 (1962); Monroe v. Pape, 365 U.S. 167 (1961); Frank v. Maryland, 359 U.S. 360 (1959); Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952).

2. Frank v. Maryland, 359 U.S. 360, 374 (1958) (Douglas, J., dissenting). *See* notes 240–55 and accompanying text *infra*.

3. *See, e.g.*, NAACP v. Alabama, 357 U.S. 449, 460–63 (1958).

4. *See, e.g.*, Boyd v. United States, 116 U.S. 616, 630 (1886).

5. 381 U.S. 479 (1965).

6. *Id.* at 480.

7. The statute provided:

> Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.

CONN. GEN. STAT. ANN. §53–32 (1958) (repealed by P.A. 828, §214, 1971).

of governmental infringement. The importance of this right was recently underscored by the Burger Court's heavy reliance upon privacy to justify limiting state abortion statutes.[8]

The right to privacy, as it has emerged from *Griswold* and the other decisions discussed below, is composed of three fundamental constitutional guarantees and has three principal dimensions. The first amendment protection of free speech and assembly is designed to safeguard the anonymity of political belief and, especially, political association. It guarantees that the individual is not compelled to publicly disclose the content of his political beliefs or his membership in political associations. The fourth amendment, certainly the core element in constitutional privacy, protects one's reasonable expectations of privacy by imposing stiff procedural requisites which must be met before a breach in the sanctity of one's physical location may occur.[9] The third and most absolute component is the fifth amendment's ban on compulsory self-incrimination, a right which safeguards the innermost sanctity of a person's mind from compulsory governmental intrusion. The total effect of these guarantees is to create a zone of privacy around various personal interests that the government cannot violate without a showing of proper justification. The significance of *Griswold* lies in its forging of these disparate lines of development into an integrated and broader right to privacy. The discussion which follows focuses upon these diverse lines in order to substantiate the *Griswold* thesis, as well as to acquaint the reader with the varied sources of the right to privacy.

I. AN ANALYSIS OF THE *Griswold* OPINIONS

A. Mr. Justice Douglas (five Justices)

In the view of Justice Douglas, the member of the Court most consistently concerned about privacy in modern society, the attempted regulation of the most intimate aspect of the marriage relationship (the statute prohibited the giving of advice, instruction, or information pertaining to contraception) invaded a constitutional "zone of privacy," even though no such right was explicitly recognized in the Constitution.[10] For Justice Douglas, the Constitution's silence did not necessarily preclude the existence of such a zone. Emanating from the explicit guarantees of the Bill of Rights were penumbras which gave the stated rights "life and substance."[11] As one commentator has written:

8. Roe v. Wade, 410 U.S. 113, 152–53 (1973); Doe v. Bolton, 410 U.S. 179, 187 (1973). *See* notes 350–56 and accompanying text *infra*.

9. Katz v. United States, 389 U.S. 347, 352–53 (1967).

10. Griswold v. United States, 381 U.S. 479, 508–10 (Black, J., dissenting).

11. *Id.* at 484.

> [T]he Constitution protects, without specific enumeration, certain essential freedoms of the individual. Labeled peripheral rights, these freedoms are derived from the penumbra or total scope of the constitutional amendments. The penumbral approach incorporates rights not explicitly included in any amendment with the rationale that their existence is vital "in making express guarantees of the various amendments fully meaningful." Without these peripheral rights the enumerated rights would be vulnerable.[12]

Thus, the rights of free speech and press, for example, must necessarily include rights to distribute, read, and receive such matter in order to fully implement the intended protection.[13]

Douglas' analysis of the emanations from the first eight amendments further supported the existence of a "zone of privacy." Case law had established that the first amendment protected political association from governmental intrusion;[14] that the third amendment safeguarded the individual from intrusions into his domestic privacy;[15] and that the fourth and fifth amendments recognized a zone of privacy in criminal prosecutions.[16] Finally, the ninth amendment recognized that not all rights protected by the Constitution are explicitly stated in its language. Hence, "[t]hese cases bore witness that the right of privacy . . . was a legitimate one."[17] Consequently, the unnecessarily broad and ill-defined Connecticut statute was held invalid as an invasion of this "zone of privacy."

Justice Douglas had long been interested in the concept of a right to privacy, and had previously stated his views on its constitutional origin. As early as 1951, in *Public Utilities Commission v. Pollak*,[18] a case involving the broadcasting of radio programs on municipal buses in the District of Columbia, he had declared:

> The case comes down to the meaning of "liberty" as used in the Fifth Amendment. Liberty in the constitutional sense must mean more than freedom from unlawful governmental restraint;

12. 17 CASE W. RES. L. REV. 601, 602 (1965) (footnotes omitted).
13. 381 U.S. at 482–83.
14. NAACP v. Alabama, 357 U.S. 449 (1959).
15. While, as this article will show, the first, fourth, and fifth amendments have all contributed to the development of constitutional privacy. Justice Douglas' reliance upon the third amendment appears misplaced. First, there appear to be neither cases nor commentary giving any definitive interpretation to the third amendment. *See* E. DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 60 (1957). Second, the only discussion of the proposed amendment during the first Congress indicated a concern not with privacy but rather with the expense and inconvenience of boarding troops. 1 ANNALS OF CONG. 751 (1834). Representative Sumter is quoted as having stated: "Their property would lie at the mercy of men irritated by a refusal, and well disposed to destroy the peace of the family." *Id.* Finally, the third amendment is obsolete and anachronistic in contemporary American life. *See* R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 229 (1955).
16. Boyd v. United States, 116 U.S. 616 (1886).
17. 381 U.S. at 485.
18. 343 U.S. 451 (1951).

> it must include privacy as well, if it is to be a repository of freedom. The right to be let alone is indeed the beginning of all freedom. Part of our claim to privacy is in the prohibition of the Fourth Amendment against unreasonable searches and seizures. . . . The First Amendment in its respect for the conscience of the individual honors the sanctity of thought and belief.[19]

Even at this early point, Douglas clearly believed that the right of privacy permeated several of the explicit guarantees of the Bill of Rights.

The most relevant statement of Douglas' viewpoint had come in *Poe v. Ullman,*[20] an earlier case than *Griswold,* dealing with this same Connecticut statute. There, the majority had rejected an attack upon the anti-contraceptive law on the basis of insufficient standing due to desuetude in the statute's enforcement.[21] In a pointed dissent, Douglas expounded upon his conception of privacy and its sources. The Justice relied very heavily upon the first amendment:

> The right of the doctor to advise his patients according to his best lights seems so obviously within First Amendment rights as to need no extended discussion. . . . The State has no power to put any sanctions of any kind on him for any views or beliefs that he has or for any advice he renders. These are his professional domains into which the State may not intrude. . . . Only free exchange of views and information is consistent with "a civilization of the dialogue . . . ."[22]

Justice Douglas also felt that due process was offended. He seemed to indicate a change from his persistent concurrence with Justice Black in advocating the incorporation theory[23] of the fourteenth amendment: "Though I believe that 'due process' as used in the Fourteenth Amendment includes all of the first eight Amendments, I do not think it is restricted and confined to them."[24] Then, after citing cases demonstrating the rights to travel[25] and to bring up children,[26] the Justice stated: " 'Liberty' is a conception that sometimes gains content from the emanations of other specific guarantees . . . or from experience

19. *Id.* at 467–68 (Douglas, J., dissenting).
20. 367 U.S. 497 (1961).
21. *Id.* at 501–09 (Douglas, J., dissenting).
22. *Id.* at 513–15 (Douglas, J., dissenting).
23. The "total incorporation theory" holds that all of the Bill of Rights (the first eight amendments) is made binding upon the states through the fourteenth amendment, either by that amendment's due process clause or its privileges and immunities clause. *See* Poe v. Ullman, 367 U.S. 497, 515–17 (1961) (Douglas, J., dissenting). This view has never persuaded a majority of the Court. *See, e.g.,* Adamson v. California, 332 U.S. 46, 68 (1947) (Black and Douglas, JJ., dissenting).
24. 367 U.S. at 516.
25. Kent v. Dulles, 357 U.S. 116 (1958).
26. Meyer v. Nebraska, 262 U.S. 390 (1923).

with the requirements of a free society."[27] In fact, Douglas candidly commented that his disagreement with the Court's previous use of substantive due process[28] had been with the standards used, and not merely with the application of such standards. Consequently, Douglas appeared to be leaning toward the "fundamental rights"[29] theory of due process rather than his previous incorporation viewpoint.

By the time of the *Griswold* opinion, Douglas had modified his position once more. His heavy stress on the penumbral approach, utilizing as it does the first eight amendments, indicated a probable return to the incorporation theory; his reference to the ninth amendment was perhaps only a "clincher" to the argument.[30] Thomas I. Emerson, who argued the case, felt that although the first amendment was not ostensibly relied upon (for there had been conduct as well as speech),[31] its influence did permeate the opinion. Certainly, Justice Douglas did make reference to efforts to contract "the spectrum of available knowledge,"[32] and did draw his primary examples of emanation from the first amendment area, namely freedom of association, freedom of inquiry and thought, and the right to teach. Yet, apparently, no single guarantee in the Bill of Rights came close enough to suffice as the protection for privacy. Therefore, the penumbral, multi-provision approach to the "zone of privacy" was adopted.[33]

B. Mr. Justice Goldberg (three Justices)

In a unique concurring opinion, Justice Goldberg agreed that the Connecticut statute violated the constitutional right to privacy of the involved married couples. However, it is his reasoning that is of

27. 367 U.S. at 517.

28. The fourteenth amendment forbids any state to enact or enforce a law depriving any person of life, liberty, or property without due process of law. The Court has frequently been sharply divided over what standard should be used in determining due process. *See, e.g.*, Adamson v. California, 332 U.S. 46 (1947); Baldwin v. Missouri, 281 U.S. 586 (1930). The Court's present position is that substantive due process is not offended if the statute bears some rational relation to a legitimate state purpose. "We refuse to sit as a superlegislature to weigh the wisdom of legislation." Ferguson v. Skrupa, 372 U.S. 726, 731 (1962). *See also* Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952).

29. The "fundamental rights" theory maintains that the fourteenth amendment protects all fundamental rights, whether mentioned in the Constitution or not. *See* Griswold v. Connecticut, 381 U.S. 479, 486–99 (1965) (Goldberg, J., concurring). *See* text accompanying notes 37–39 *infra* for Justice Goldberg's test as to what is a fundamental right.

30. *See* 54 KY. L.J. 794, 796 (1966).

31. Appellants admitted that they had engaged in actions (giving examinations, etc.) as well as speech, but argued: (1) that the conduct was essential to a meaningful exercise of free speech; and (2) speech and action should not be lumped together to the detriment of first amendment rights. *See* Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 221–22 (1965).

32. 381 U.S. at 482.

33. *See* Comment, *Connecticut Contraceptive Ban v. Right of Privacy*, 34 U. MO. K.C.L. REV. 95 (1966).

primary interest, for in an almost unprecedented fashion, Justice Goldberg based his opinion largely upon the "forgotten" ninth amendment:[34]

> The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments. . . . It was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others would be protected.[35]

Hence, the ninth amendment (although not an independent source of rights) was meant to remind us that certain "fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments."[36] And although the ninth amendment per se was not applicable to the states through the fourteenth amendment, it protected certain basic personal liberties which were deemed "fundamental."

The key question thus became what standards were to be used to determine whether a particular right was "fundamental"? Goldberg suggested a number of possible indicators: tradition and collective conscience of the American people;[37] the fundamental principles and liberties which formed the foundation of our political institutions;[38] and the requirements of a free society.[39] It was obvious to Justice Goldberg that the sanctity of the family and marital relationship, "a relation as old and as fundamental as our entire civilization,"[40] was among those intrinsic rights which demanded protection from abridgement by government.

It is interesting to note, however, that privacy appeared a less absolute value for Justice Goldberg than for Justice Douglas.[41] Justice Goldberg seemed quite willing to apply a balancing perspective when

34. For a comprehensive analysis of the ninth amendment's legislative and judicial histories, including its role in protecting privacy, *see* Clark, *The Ninth Amendment and Constitutional Privacy*, 5 U. TOL. L. REV. 83 (1973).

35. 381 U.S. 479, 488–89 (1965) (Goldberg, J., concurring) (footnotes omitted).

36. *Id.* at 492.

37. *Id.* at 493.

38. *Id.*

39. *Id.*

40. *Id.* at 494.

41. In his recent concurring opinion in Roe v. Wade, 410 U.S. 113 (1973), Justice Douglas stated his view that first amendment rights are absolute. *Id.* at 211–12 (Douglas, J., concurring). However, he also stated that numerous freedoms in which privacy is an issue (his examples: "marriage, divorce, procreation, contraception, and the education and upbringing of children") are "subject to some control by the police power." *Id.* Therefore, privacy in his view consists of some rights that are absolute and some that are properly subject to a balancing test. *Id.*

the right to privacy conflicted with a legitimate need of government. He cited several cases for the proposition that the marital relation was a fundamental right which the state could not abridge by merely showing that such would bear some rational relation to a legitimate state purpose.[42] The Justice easily dismissed the state's argument that the statute discouraged extramarital affairs by noting that the effect of the statute reached far beyond the evil with which it was intended to deal, and intruded upon the privacy of all married couples.[43] Hence, a compelling state interest in encroaching the right had to be demonstrated to justify the state's invasion of marital privacy and no such interest was demonstrated. The right of marital privacy was a fundamental right "retained by the people" through the ninth amendment, and, absent a compelling state interest, it could not constitutionally be infringed by the state since it was protected by the fourteenth amendment.

Justice Goldberg's unexpected reliance upon the long-dormant ninth amendment quite naturally triggered speculation as to the reason for his views. One commentator has suggested a possible explanation:

> Apparently Goldberg felt he could not rely solely on the fourteenth amendment, because the Court had denuded its substantive content by deferring to the legislature the determination of the reasonableness of regulatory legislation and by tending to limit the application of the due process clause to the incorporation or absorption of the specific rights of the first eight amendments. By coupling the ninth amendment to the fourteenth, Goldberg apparently attempted to revive some of the latter's substantive content and invoke the precedents upholding the right of family privacy.[44]

Yet, the Court had consistently used the "fundamental rights" method of interpreting the fourteenth amendment with apparently no need to resort to the ninth amendment. Indeed, it has been argued that Justice Goldberg's opinion can be seen as refuting the rationale of Black's incorporation theory[45] while supporting that of either the "absorption process"[46] or the test of *Palko v. Connecticut*[47] favored by Justice Harlan.

42. Poe v. Ullman, 367 U.S. 497, 551–52 (1961) (Harlan, J., dissenting); Pierce v. Society of Sisters, 268 U.S. 510 (1924); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

43. 367 U.S. at 497.

44. Katin, Griswold v. Connecticut: *The Justices and Connecticut's "Uncommonly Silly Law,"* 42 NOTRE DAME LAW. 680, 686 (1967) (footnotes omitted).

45. 12 WAYNE L. REV. 479, 481 (1966).

46. *See* 12 WAYNE L. REV. 479 (1966), where the author characterizes Justice Goldberg's, as well as Justice Douglas', approach to the fourteenth amendment in *Griswold* as the "absorption process." *Id.* at 480 n.14, 481. In contrast to the total incorporation view, the absorption approach advocates a "gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require." Davidson v. New Orleans, 96 U.S. 97, 104 (1878).

47. 302 U.S. 319 (1937). *Palko* held that a state's denial of rights enumerated in the first eight amendments offended the due process clause of the fourteenth amend-

C. *Mr. Justice Harlan*

The concurrence of Justice Harlan represented the traditional Cardozo-oriented approach the Court had utilized in the past to give content to the due process clause of the fourteenth amendment. As Justice Cardozo had indicated in *Palko v. Connecticut,*[48] the due process clause protected values "implicit in the concept of ordered liberty."[49] For Justice Harlan, this meant that the content of the due process clause was not limited to the explicit elements of the Bill of Rights, as in Justice Black's incorporation theory,[50] but that it also protected rights which, independent of their origin, were deemed to be "fundamental." As a result, Justice Harlan was distressed in *Griswold* by Douglas' penumbral approach which was limited to the Bill of Rights guarantees:

> In other words, what I find implicit in the Court's opinion is that the "incorporation" doctrine may be used to *restrict* the reach of Fourteenth Amendment Due Process. For me this is just as unacceptable constitutional doctrine as is the use of the "incorporation" approach to *impose* upon the States all the requirements of the Bill of Rights as found in the provisions of the first eight amendments and in the decisions of this court interpreting them.[51]

Therefore, Justice Harlan's test of fundamental rights is probably identical — save for its reliance upon the due process clause rather than the ninth amendment — to Justice Goldberg's, undoubtedly including the latter's tests for determining what is intrinsic to liberty.

However, as he had indicated in his dissenting opinion in *Poe v. Ullman,*[52] Justice Harlan did not share in Justice Goldberg's reluctance to employ the notion of substantive due process. If due process were limited to procedural fairness only, "it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three."[53] Justice Harlan's guiding standards emerged from the context of American history, values, and postulates of liberty: "It is a rational continuum which, broadly speak-

ment only when such rights were "implicit in the concept of ordered liberty . . . ." *Id.* at 324–25 (1937). In Benton v. Maryland, 395 U.S. 784 (1968), the Court held the *Palko* approach to be inappropriate when applied to the fifth amendment's double jeopardy prohibition, and overruled *Palko* insofar as it was inconsistent with its holding. *Id.* at 793–94.

48. 302 U.S. 319 (1937). *But see* note 47 *supra.*

49. *Id.* at 324–25.

50. *See* note 23 *supra.*

51. 381 U.S. at 500 (Harlan, J., concurring).

52. Poe v. Ullman, 367 U.S. 497 (1961) (Harlan, J., dissenting).

53. *Id.* at 541.

ing, includes a freedom from all substantial and arbitrary impositions and purposeless restraints . . . ."[54] Therefore, any statute which sought to allow government to invade the privacy of the home had to be subjected to strict scrutiny. While Justice Harlan had pointed to the third and fourth amendments in *Poe* as two sources of domestic privacy, in *Griswold* he emphasized that due process privacy was not dependent upon any of the amendments or their radiations. Nevertheless, as he had stated in *Poe,* "The right of privacy most manifestly is not an absolute."[55] In this situation, however, the state had sanctioned the marital relationship, unlike adultery or homosexuality, and the means adopted ostensibly to prevent marital infidelity — suppressing knowledge of contraceptives — swept far too broadly to be justified. Justice Harlan concluded that the state had violated marital privacy with insufficient justification.

This examination of the *Griswold* opinions has demonstrated that three different rationales were employed therein to reach the same conclusion, that Connecticut's statute violated a constitutional right to privacy.[56] It is submitted that Justice Douglas' opinion is the most significant of the three approaches. Not only was it the thesis agreed upon by a majority of the Court, but it also offers the broadest potential for further expansion of a general right to privacy beyond the confines of *Griswold*'s concern with marital privacy. The following discussion centers upon the three major prongs of the emanation approach: the first, fourth, and fifth amendments. It is these three components which, when united into a complex constitutional right, establish the fundamental presumption in favor of individual privacy.

II. THE FIRST AMENDMENT AND PROTECTION OF POLITICAL PRIVACY

One characteristic hallmark of the cold war's unceasing fear of internal subversion was the expanded role played by both state and federal legislative investigations. In addition to their role as "information-gathering" agencies, these investigative committees had increasingly become "information-giving" sources as well.[57] That is, legislative

54. *Id.* at 543.

55. *Id.* at 552.

56. Justice White, in a concurring opinion, wrote that the Connecticut statute would have to bear "a substantial burden of justification" to be validated, since it was a significant intrusion into personal freedom. He further found that the state had not shown any compelling reason to invade that freedom, and thus that the statute deprived couples of liberty without due process of law, as required by the fourteenth amendment. 381 U.S. at 502–07 (White, J., concurring).

57. *See* Comment, Watkins v. United States, 56 MICH. L. REV. 272, 273 (1957).

committees no longer sought information merely to aid the drafting of informed legislation, but, in many instances, published such data so freely that it produced exposure for exposure's sake.[58]

The foremost employers of this exposure policy on the national level were the Senate Internal Security Subcommittee and the House Committee on Un-American Activities (HCUA) during their investigations into subversion in such sensitive areas as education, the media, and various political organizations. On the state level, the primary targets were various branches of the National Association for the Advancement of Colored People (NAACP) in the southern states. At both levels, compulsory testimony before legislative investigating committees yielded information which was thrust into the glaring light of media publicity. Frequently, this unwelcomed media attention resulted in full exposure of the unpopular political activities and beliefs of individuals and groups. Repeatedly, this public exposure culminated in public ridicule, loss of employment, destruction of friendships, opprobrium, and even danger of physical injury.

On the national level, the principal method of protecting oneself from such public disclosure and displeasure was the invocation of the fifth amendment. Many of those who claimed the privilege were not apprehensive of possible criminal prosecution, but rather were fearful that in the wake of exposure their freedoms of political belief and association would be severely curtailed through public pressure.[59] Others simply believed that such a public probing of individual and group beliefs involved an unwarranted invasion of free conscience, belief, and sanctity of mind — the very type of action the Supreme Court had seemed to deny the government in *West Virginia Board of Education v. Barnette.*[60] In *Barnette,* Justice Jackson had poignantly written:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics . . . or other matters of opinion or force citizens to confess by word or act their faith therein. If there are

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58. *See* Carr, *Investigations in Operation: The Un-American Activities Committee,* 18 U. CHI. L. REV. 598, 599 (1951), where the author, in discussing the House Committee on Un-American Activities, states:

> [A]lways its interest in public opinion has been paramount. The Committee has been concerned lest the American people fail to share its understanding of the nature of subversive activity and the many forms it may take, or appreciate the seriousness of the threat offered by this activity to the "American Way of life" as seen by itself.

Id. at 599.

59. *See* Liacos, *Rights of Witnesses Before Congressional Committees,* 33 B.U.L. REV. 337, 362-69 (1953).

60. 319 U.S. 624 (1943).

> any circumstances which permit an exception, they do not now occur to us.[61]

Some of those deeply concerned with the adverse implications of such invasions of privacy for the freedom of political belief nevertheless refused to imbrue themselves with the stigma attached to an invocation of the fifth amendment. Instead, during the McCarthy period, they turned to the first amendment's protection of free speech and association, believing that if preferred freedoms were real, privacy of conscience certainly would be protected from unwarranted legislative intrusion.

The first amendment defense initially made its appearance in a series of lower federal court decisions in the late 1940's.[62] The factual backgrounds of the cases were strikingly similar: HCUA investigative committees questioning alleged subversives regarding their past and present political beliefs and associations, a refusal by the witnesses to answer the inquiries based upon first amendment immunity and prompt citation for contempt. In passing upon the legitimacy of these contempt citations, the courts uniformly upheld the authority of Congress to require answers to such questions. A variety of rationalizations were offered, but the most basic reason justifying denial of the first amendment defense was simply that Congress had a right to inform itself about potential Communist subversion.[63] The additional fact that these investigations might touch upon areas involving free speech was not considered a sufficient reason to restrict the power to investigate.[64] The courts obviously thought that the first amendment could be amply protected should Congress attempt to create and implement unconstitutional legislation (as distinguished from mere investigation), but that any such protection for preferred freedoms had to await the actual passage of such detrimental statutes.[65] In any regard, the first amendment was not an absolute bar to governmental action, as indicated by the limitations held to have been lawfully imposed upon obscenity, incitement to riot, and advocacy of overthrowing the government.[66] Furthermore, although adverse pressures might

61. *Id.* at 642. As Senator Ervin has recently argued, the problem with unlimited investigative power is "that it clashes with the fundamental constitutional principle that what people are thinking is none of the business of government investigators. I believe that, unchecked, the exercise of such an inherent power can quickly give this nation the trappings of a police state." Ervin, *Privacy and Government Investigation,* 21 U. ILL. L.F. 137, 140 (1971).

62. Barsky v. United States, 167 F.2d 241 (D.C. Cir.), *cert. denied,* 334 U.S. 843 (1948); United States v Josephson, 165 F.2d 82 (2d Cir. 1947), *cert. denied,* 333 U.S. 838 (1948); United States v. Bryan, 72 F. Supp. 58 (D.D.C. 1947).

63. *See, e.g.,* United States v. Josephson, 165 F.2d 82, 90–92 (2d Cir. 1947), *cert. denied,* 333 U.S. 838 (1948).

64. *See, e.g.,* United States v. Bryan, 72 F. Supp. 58, 62–63 (D.D.C. 1947).

65. *See, e.g.,* United States v Josephson, 165 F.2d 82, 91–92 (2d Cir. 1947), *cert. denied,* 333 U.S. 838 (1948).

66. *See, e.g.,* United States v. Bryan, 72 F. Supp. 58, 63 (D.D.C. 1947).

result from this public exposure, the acts were performed by private individuals and were not the responsibility of Congress.[67]

Only rarely, in poignant dissent, was the truly destructive potential for debilitating first amendment rights inherent in this legislative exposure even recognized. Judge Charles Clark, dissenting in *United States v. Josephson,*[68] cogently reasoned that if Congress were constitutionally restrained from infringing speech and belief through legislation, it could not use the devices of investigation and publicity to accomplish the same ends.[69] Similar objection was registered by Judge Henry Edgerton in *Barsky v. United States*:[70] "That the Committee's investigation does in fact restrict speech is too clear for dispute. The prosecution does not deny it and the court concedes it."[71] Such investigations, always well publicized by the media, restricted freedom of speech by uncovering and stigmatizing the expression of unpopular views. Furthermore, "[t]he effect is not limited to the people whom the Committee stigmatizes or calls before it, but extends to others who hold similar views and to still others who might be disposed to adopt them."[72] Pointing to the Supreme Court's decision in *West Virginia Board of Education v. Barnette,*[73] Judge Edgerton indicated that free speech included the right *not* to speak,[74] and, echoing Judge Clark's dissent in *Josephson,*[75] he concluded: "What Congress may not restrain, Congress may not restrain by exposure and obloquy."[76]

The Supreme Court studiously avoided passing upon other than procedural issues relating to congressional investigations until 1957.[77] That year brought the first major pronouncement on, and recognition of, the first amendment defense, though it was largely limited to dicta.[78] In *Watkins v. United States,*[79] the Court upheld the petitioner's attack upon an HCUA investigation where he had been called as a witness. Watkins, a labor organizer, had refused to testify about former associates who might have been Communist party members, and whom

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67. *See, e.g.,* Barsky v. United States, 167 F.2d 241, 246–50 (D.C. Cir.), *cert. denied,* 334 U.S. 843 (1948).
68. 165 F.2d 82 (2d Cir. 1947) (Clark, J., dissenting), *cert. denied,* 333 U.S. 838 (1948).
69. *Id.* at 93.
70. 167 F.2d 241 (D.C. Cir.), *cert. denied,* 334 U.S. 843 (1948).
71. *Id.* at 255 (Edgerton, J., dissenting) (footnotes omitted).
72. *Id.*
73. 319 U.S. 624 (1943). *See* text accompanying notes 60–61 *supra.*
74. 167 F.2d at 255 (Edgerton, J., dissenting).
75. 165 F.2d at 93 (Clark, J., dissenting).
76. 167 F.2d at 256 (Edgerton, J., dissenting).
77. *See* PRITCHETT, THE POLITICAL OFFENDER AND THE WARREN COURT 83–84 (1958).
78. *See* Comment, *First Amendment Rights of Witnesses Before Congressional Investigating Committees,* 7 VILL. L. REV. 84, 90–94 (1961).
79. 354 U.S. 178 (1957).

he believed had long since left the party.[80] Essentially, the Court added to its previously articulated requirement of legitimate legislative purpose[81] the further procedural requirement that all questions must be germane to the subject under investigation. Furthermore, upon demand by the witness, the pertinency of every question was to be related to the purpose of the investigation.

In addition to imposing these procedural limitations, Chief Justice Warren's majority opinion included an important discussion about the first amendment. Affirming the applicability of first amendment protections to Congressional investigations as well as to direct lawmaking, the Chief Justice declared that "there is no Congressional power to expose for the sake of exposure."[82] The Chief Justice continued:

> Abuses of the investigative process may imperceptibly lead to abridgement of protected freedoms. The mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference. And when those forced revelations concern matters that are unorthodox, unpopular, or even hateful to the general public, the reaction in the life of the witness may be disastrous. This effect is even more harsh when it is past beliefs, expressions or associations that are disclosed and judged by current standards rather than those contemporary with the matters exposed. Nor does the witness alone suffer the consequences. Those who are identified by witnesses and thereby placed in the same glare of publicity are equally subject to public stigma, scorn and obloquy.[83]

The mere fact that Congress itself did not carry out the retribution initiated by its acts of exposure "cannot relieve the investigators of their responsibility for initiating the reaction."[84] Such adverse public reaction seriously inhibits freedom of communication and unpopular political activity — basic rights protected by the first amendment.[85]

Yet, Warren also recognized the necessity for accommodating the need of Congress for particular information with the individual's personal interest in privacy and unhindered political activity: "The crucial element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness."[86]

80. *Id.* at 181–86.

81. *See* Sinclair v. United States, 279 U.S. 263 (1929); McGrain v. Daugherty, 273 U.S. 135 (1927); *In re* Chapman, 166 U.S. 661 (1897); Kilbourn v. Thompson, 103 U.S. 168 (1881).

82. 354 U.S. at 200.

83. *Id.* at 198.

84. *Id.*

85. It has been asserted that such diminishing of first amendment rights results in the very inability to reach decisions necessary for self-government. Note, *Privacy in the First Amendment*, 82 YALE L.J. 1462, 1468 (1973).

86. 354 U.S. at 198.

Proper investigations must have a "clear determination by the House or the Senate that a particular injury is justified by specific legislative need."[87] However, the Justice cautioned:

> We cannot simply assume, however, that every congressional investigation is justified by a public need that overbalances any private rights affected. To do so would be to abdicate the responsibility placed by the Constitution upon the judiciary to insure that the Congress does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion, or assembly.[88]

While Chief Justice Warren's dictum showed the Court's concern about the possible abridgement of the first amendment in legislative investigations, his pregnant phrases about "specific legislative need" indicated that given a legitimate purpose (as determined by the Court), the first amendment would have to yield to public necessity. Nevertheless, the important aspect of the decision is that the Court "stated explicitly that, in order to protect first amendment freedoms of individuals from unnecessary abridgement at the hands of congressional committees, it would prohibit the use of compulsory process beyond the point at which the congressional need for information could no longer reasonably justify incursions into these freedoms."[89]

A more precise definition of the first amendment defense was offered in *NAACP v. Alabama,*[90] a case growing out of a state investigation. Alleging that the NAACP, a New York corporation, had failed to comply with state legislation requiring the registration of foreign corporations doing business within Alabama, the state had secured, in a state circuit court, orders requiring the NAACP to produce records and documents, including its state membership lists. The NAACP complied with all elements of the court orders, except for producing its membership registry; subsequently the Association was held in contempt.[91]

Initially, there appeared to be a considerable body of precedent supporting the Alabama regulation. In *People* ex rel. *Bryant v. Zimmerman,*[92] the Court had upheld a New York statute requiring the

87. *Id.* at 205.

88. *Id.* at 198–99.

89. Alfange, *Congressional Investigations and the Fickle Court,* 30 U. CINN. L. REV. 113, 135 (1961). The Court directed a similar message to state legislative investigations in the companion case of Sweezy v. New Hampshire, 354 U.S. 234 (1957).

90. 357 U.S. 449 (1958).

91. *Id.* at 452–54. For a general discussion of the NAACP and its fight for free associations, see H. KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 65–121 (1965).

92. 278 U.S. 63 (1928).

Ku Klux Klan to file membership statements. There, the Court had reasoned that the state had a right to oversee associations formed under its protection, and that such public disclosure of private information would discourage illegal activity.[93] Yet, that case could be distinguished on the ground that the Klan was a group which most probably had engaged in some illegal activity, a characterization not true of the NAACP. However, the Court had also upheld compulsory registration statutes affecting lobbyists[94] and foreign agents[95] which applied to all political groups equally, not just a single unpopular organization. Nonetheless, even though all such groups might comply, the public opprobrium would fall, naturally, only upon the unpopular and unorthodox groups, thereby working an inequality.[96]

Further distinguishing characteristics may also be noted. The importance of alien propagandist registration during wartime, as well as regulation of lobbyists seeking to influence federal legislation, was so substantial that any collateral adverse effects upon freedom of association and belief were outweighed.[97] The issue, therefore, with respect to NAACP registration, could be phrased as whether the state had a sufficiently vital interest to justify these inhibiting effects upon the first amendment. Indeed, the case is similar to that of *Thomas v. Collins,*[98] where a Texas statute[99] required union organizers to register and identify themselves before they could address any labor meeting. There, the Court flatly declared that any attempt to so limit free speech must be predicated upon a showing that the subject activity created a "clear and present danger" to the public interest:[100] "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitations."[101]

In its consideration of the case, the Supreme Court attributed great weight to the NAACP's claim that this disclosure violated its members' freedom of association as protected by the fourteenth amendment.[102] Accordingly, in his opinion for an unanimous Court, Justice

93. *Id.* at 75–76. *See also* Robison, *Protection of Associations from Compulsory Disclosure of Membership,* 58 COLUM. L. REV. 614, 642–46 (1958).

94. United States v. Harriss, 347 U.S. 612 (1954).

95. Viereck v. United States, 318 U.S. 236 (1943).

96. *See* Note, *State Control Over Political Organizations: First Amendment Checks on Powers of Regulation,* 66 YALE L.J. 545, 562–63 (1957).

97. *See generally* D. FELLMAN, THE CONSTITUTIONAL RIGHT OF ASSOCIATION 67 (1963); Nutting, *Freedom of Silence: Constitutional Protection Against Governmental Intrusion into Political Affairs,* 47 MICH. L. REV. 181, 213 (1948).

98. 323 U.S. 516 (1945).

99. TEX. REV. CIV. STAT. ANN. art. 5154, § 5 (1962).

100. 323 U.S. at 530.

101. *Id.*

102. The Court stated: "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group associations, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly." 357 U.S. at 460. For the birth and

Harlan stated that such compulsory disclosure would abridge the rights of the NAACP's members to engage in lawful association in support of their common beliefs:

> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action . . . . Inviolability of privacy in group association may in many circumstances be indispensable to the preservation of freedom of association, particularly where a group espouses dissident beliefs.[103]

Such public exposure, he noted, would subject individuals so identified to economic reprisals, loss of employment, threats of physical coercion, and other manifestations of public hostility.[104]

In the section of the opinion most relevant to the first amendment defense, Justice Harlan further clarified the intimate relationship between privacy and unhampered political activity. The fact that subsequent retribution was meted out not by government officials but by private individuals did not excuse the original intrusion.[105] Rather, "[t]he crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the producton order that private action takes hold."[106] If any such disclosure was to take place, the subordinating interest of the state must be compelling.[107] The Court found little connection between the ostensible purpose of the registration statute and the order that membership lists be provided. Furthermore, "whatever interest the State may have in obtaining names of ordinary members has not been shown to be sufficient to overcome petitioner's constitutional objections to the production order."[108] Consequently, the first amendment defense could have been overcome only if a sufficiently compelling interest had been demonstrated; failing that, the balance swung to the side of individual rights.

The next major Supreme Court decision involving the first amendment defense made it quite evident that the Court had adopted a balancing perspective, pitting the rights of the individual against the

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evolution of free association under the first amendment, *see* Abernathy, *The Right of Association,* 6 S.C.L.Q. 32 (1953); Douglas, *The Right of Association,* 63 COLUM. L. REV. 1361 (1963); Emerson, *Freedom of Association and Freedom of Expression,* 74 YALE L.J. 1 (1964); Rice, *The Constitutional Right of Association,* 16 HASTINGS L.J. 491 (1965); Wyzanski, *The Open Window and the Open Door: An Inquiry into Freedom of Association,* 35 CALIF. L. REV. 336 (1947); Comment, *Freedom of Association: Constitutional Right or Judicial Technique?,* 46 VA. L. REV. 730 (1960).

103. 357 U.S. at 462.
104. *Id.*
105. *Id.* at 463.
106. *Id.*
107. *Id.* at 465-66.
108. *Id.* at 465.

needs of society.[109] *Barenblatt v. United States*[110] involved a situation highly analogous to that in *Watkins v. United States*,[111] although the subject matter was subversion in education rather than in labor. The issue was whether inquiry into past or present membership in the Communist Party transgressed the limitations of the first amendment. Justice Harlan, writing for the majority, began the opinion by distinguishing a claim based upon the fifth amendment from one anchored in the first. The former claim was absolute in nature,[112] as it gave a witness the means to resist inquiry in all circumstances in which the "witness has reasonable cause to apprehend danger from a direct answer."[113] However, the language of the first amendment, although drafted in at least equally absolute terms, was held susceptible to a more restricted application:

> Undeniably, the first amendment in some circumstances protects an individual from being compelled to disclose his associational relationships. However, the protections of the First Amendment, unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment, do not afford a witness the right to resist inquiry in all circumstances. Where First Amendment rights are asserted to bar government interrogation resolution always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown. These principles were recognized in the *Watkins* case, where, in speaking of the First Amendment in relation to congressional inquiries, we said . . . "The crucial element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness."[114]

Justice Harlan found that Congress had "wide power to legislate in the field of Communist activity in this country,"[115] for national self-

109. For a view that this choice was an unfortunate one not intended by the original drafters, *see* McKay, *Congressional Investigations and the Supreme Court*, 51 CALIF. L. REV. 267 (1963), where the author states:

> Indeed, the real truth seems to be that, if the balancing test is applied, the first amendment is drained of all meaning except to say that government should not act unreasonably. But surely it was not the original intent that the first amendment should mean nothing different than the due process protection against arbitrary and unreasonable governmental action.

Id. at 281. On the merits and disadvantages of the balancing approach, *see* Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821 (1962).

110. 360 U.S. 109 (1959).

111. 354 U.S. 178 (1957). *See* notes 79–89 and accompanying text *supra*.

112. *See, e.g.*, Quinn v. United States, 349 U.S. 155 (1955); Hoffman v. United States, 341 U.S. 479 (1951). For further discussion, *see* Redlich, *Rights of Witnesses Before Congressional Committees: Effects of Recent Supreme Court Decisions*, 36 N.Y.U.L. REV. 1126, 1127–36 (1961).

113. Hoffman v. United States, 341 U.S. 479, 486 (1951).

114. 360 U.S. 109, 126–27 (1959).

115. *Id.* at 127.

preservation was involved, and consequently it had authority to investigate for this purpose. Therefore, even though *Barenblatt* involved a teacher and his lectures, Justice Harlan concluded that where "investigation of advocacy or preparation for overthrow" are proper topics of an investigation, there is a right to identify a witness as a member of the Communist Party.[116]

Perhaps even more significant was the Court's refusal to sanction an attack against the investigation's validity on the basis that its motive was simply to expose, a major point relied upon in *Watkins*:

> So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power. . . . The remedy for this [exposure], however, lies not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of lawful power.[117]

Therefore, given a legitimate legislative purpose and a subject matter of significant public importance, the balance will usually be struck in the government's favor, and, accordingly the provisions of the first amendment will not be offended.[118] For the dissenting Justices Black and Douglas, however, any restriction of the first amendment, without a nexus in preventing illegal *action,* was a direct infringement of the amendment's intended absolute protection.[119]

In several cases arising from the operation of state investigative statutes, the Supreme Court also recognized broad authority to investigate subversion, while moving to protect other forms of political privacy. In *Uphaus v. Wyman,*[120] plaintiff, in the course of a state investigation into subversive activities, refused to provide a list of persons who had attended a "World Fellowship" camp at which he had been a director. For Mr. Justice Clark, the state had justification to believe these persons at the camp were subversives within the meaning of New Hampshire law,[121] and the investigation, therefore, was undertaken as part of the state's right of "self-preservation," the ultimate value for any society.[122] Consequently, Justice Clark found that

116. *Id.* at 129–30.
117. *Id.* at 132–33.
118. *Id.* at 134.
119. *Id.* (Douglas and Black, JJ., dissenting). For a sharp criticism of *Barenblatt, see* Alfange, *Congressional Investigations and the Fickle Court,* 30 U. CINN. L. REV. 113 (1961).
120. 360 U.S. 72 (1959).
121. *Id.* at 78–79, *citing* N.H. REV. STAT. ANN. §§588:1–16 (1955).
122. *Id.* at 81, *quoting* Dennis v. United States, 341 U.S. 494, 509 (1951). Justice Clark went to some effort to justify the existence of New Hampshire's subversion statute in light of Pennsylvania v. Nelson, 350 U.S. 497 (1956). In *Nelson,* the conviction of petitioner under the Pennsylvania Sedition Act was overturned on the

"[t]his governmental interest outweighs individual rights in an associational privacy which, however real in other circumstances . . . were here tenous at best."[123]

However, in an analogous situation, when the NAACP sought to prevent forced disclosure of its membership list as part of Little Rock, Arkansas' occupational license tax ordinance, the Court hastened to reaffirm its holding in *NAACP v. Alabama*[124] since the city was not able to demonstrate an interest of sufficient magnitude to limit the freedom of association.[125] Thus the Court found no direct relationship between the possession of the membership lists and the securing of the information necessary to levy the tax.

In 1960, the Supreme Court decided two additional cases which further indicated that the delicate balance between privacy and disclosure would not always be struck in favor of government. In *Talley v. California,*[126] Los Angeles had passed an ordinance making it a criminal offense to circulate handbills unless the names and addresses of those who prepared and distributed them were included.[127] The interest the city posited to justify the regulation was its need to combat fraud, false advertising, and libel.[128] The Court weighed this interest against the crucial role that anonymous publication had played in promoting unhampered political discussion. From the outset, the Court clearly dispelled the idea that anonymity of publication was inconsistent with constructive purpose. As Justice Black wrote:

> There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value."[129]

Referring to NAACP cases, Justice Black further declared: "The reason for those holdings was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance. This broad Los Angeles ordinance is subject to the same infirmity."[130]

ground that the Smith Act, 18 U.S.C. § 2385 (1970), superseded it. *Id.* at 500–20. In *Uphaus,* Justice Clark expressed the view that *Nelson* was inapposite, for two reasons: first, *Nelson* involved a state prosecution, whereas in the instant case the state was conducting only a legislative inquiry; second, *Nelson* was held only to foreclose a state prosecution for sedition against the federal government; a state could still prosecute seditions against itself. 360 U.S. at 76–77.

123. 360 U.S. at 80.
124. 357 U.S. 449 (1958). *See* notes 90–108 and accompanying text *supra.*
125. Bates v. Little Rock, 361 U.S. 516, 524–27 (1960).
126. 362 U.S. 60 (1960).
127. *Id.* at 60–61.
128. *Id.* at 64.
129. *Id., quoting* Lovell v. Griffin, 303 U.S. 444, 452 (1938).
130. 362 U.S. at 65. *See* Note, *The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil,* 70 YALE L.J. 1084, 1102–03 (1961).

In the second case, *Shelton v. Tucker,*[131] an Arkansas statute required, as a condition of employment, that every public school teacher annually file an affidavit listing the organizations to which he or she had belonged or regularly contributed within the previous five years.[132] The majority opinion, written by Justice Stewart, evidenced a concern with the community pressures that could be applied against teachers belonging to unpopular political groups. Not only might they be subject to harassment, but public pressure might compel local school boards to terminate their contracts.

> It is not disputed that to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech, and a right which, like free speech, lies at the foundation of a free society.[133]

While it cannot be disputed that a school board has a legitimate interest in factors that bear upon a teacher's competence, including relevant associations, this particular statute was far too broad and comprehensive to justify sustaining it against the significant individual rights involved.

However, in those cases where the Communist Party was explicitly involved, the Court continued to balance the scale of conflicting rights in favor of the government. For example, in *Communist Party v. Subversive Activities Control Board,*[134] the party had been directed to register as a subversive organization under the Subversive Activities Control Act.[135] A portion of the Subversive Activities Control Board's order required the party to provide a membership list. While Justice Frankfurter's opinion frankly acknowledged the limitation upon the first amendment inherent in such an order, he concluded that competing considerations tipped the scales in favor of the government,[136] because in this type of case the need of society to protect itself against subversion became paramount. In contrast with the NAACP cases[137] and *Shelton v. Tucker,*[138] the membership list in this situation had a direct relationship to a legitimate need of government. Any resulting opprobrium and obloquy were necessary costs to strip away the anonymity which, while protecting Communists from popular prejudice,

131. 364 U.S. 479 (1960). *See* Bendich, *First Amendment Standards for Congressional Investigations,* 51 CALIF. L. REV. 311 (1963).

132. 364 U.S. at 480. No. 10, §§ 2–5, [1958] Ark. Acts 2d Ex. Sess. 2018 (declared unconstitutional by Shelton v. Tucker, 364 U.S. 479 (1960)).

133. 364 U.S. at 485–86. *See also* Baggett v. Bullitt, 377 U.S. 360 (1964).

134. 367 U.S. 1 (1961).

135. Act of Sept. 23, 1950, ch. 1024, § 7, 64 Stat. 993.

136. *Id.* at 4–8.

137. NAACP v. Alabama, 357 U.S. 449 (1958); NAACP v. Alabama, 361 U.S. 516 (1960). *See* notes 90–108 and accompanying text *supra.*

138. 364 U.S. 479 (1960). *See* notes 133–34 and accompanying text *supra.*

also allowed the party to carry out the plans of a "foreign-directed conspiracy."[139]

This dual standard the Court had developed in deciding first amendment claims of the right to political anonymity, whereby the claim would be rejected if the organization were Communist, met an interesting test in 1963. The case, *Gibson v. Florida Legislative Investigation Committee,*[140] involved both the key elements of the NAACP and an investigation into subversion. Gibson, the president of the Miami Beach branch of the NAACP, was called before a state investigating committee to answer questions relating to Communist infiltration into civil rights organizations.[141] He refused to produce NAACP records, declaring that exposure of the membership list would be a serious infringement upon the members' right to free association.[142]

Justice Goldberg's opinion began by noting that both sides agreed the key issue was whether there existed a "substantial relation between the information sought and a subject of overriding and compelling state interest."[143] That is, was there a "nexus" between the Miami Beach branch and any Communist activity? In order to clarify this question, he distinguished the line of cases beginning with *Uphaus v. Wyman*[144] which had upheld a broad power to investigate subversion. He stated that, in those cases, the witnesses had refused to answer questions about their own past or present membership in the Communist Party. In contrast, Gibson was not suspected of being a Communist; rather, it was the association which was the subject of the investigation. Yet, the record did not suggest that the NAACP, or even this branch, was a subversive organization; in fact, both the national and local associations had taken steps to eliminate any such individuals from leadership positions.[145] Consequently, concluded Justice Goldberg, the questions which Gibson refused to answer were not about membership in any Communist agency, but rather concerned a legitimate and nonsubversive group.

This was, therefore, a very different situation from those in the leading cases on investigating subversion. As Justice Goldberg explained:

> The prior holdings that governmental interest in controlling subversion and the particular character of the Communist Party and

139. 364 U.S. at 102–03.
140. 372 U.S. 539 (1963).
141. *Id.* at 541–43.
142. *Id.* at 542–43.
143. *Id.* at 546.
144. 360 U.S. 72 (1959). See notes 126–28 and accompanying text *supra*.
145. 372 U.S. at 548.

> its objectives outweigh the right of individual Communists to conceal party membership or affiliations by no means require the wholly different conclusion that other groups — concededly legitimate — automatically forfeit their rights to privacy of association simply because the general subject matter of the legislative inquiry is Communist subversion or infiltraiton.[146]

Furthermore, since there was no evidence from the record that there existed a "substantial connection" between any Communist subversion and the Miami Beach branch, a factor which the committee itself acknowledged to be a necessary prerequisite for any such investigation, the state had failed to demonstrate "the immediate, substantial, and subordinating state interest necessary to sustain its right of inquiry into the membership lists of the association."[147] Without meeting this threshold requirement, there was no justification for demanding the membership lists of a nonsubversive association;[148] otherwise, the rights guaranteed by the first amendment would be jeopardized and weakened without sufficient justification.[149] For several Justices,[150] however, there was no difference in state interest between Communist infiltration *of* organizations and Communist activity *by* organizations.[151]

The most recent Supreme Court case on this point, *De Gregory v. New Hampshire*,[152] also involved a state investigation into subversion. A 1963 investigation asked De Gregory about his alleged Communist activities prior to 1957. He refused to answer upon first amendment grounds, but indicated that he had no knowledge of any Communist activities after 1957.[153] Speaking for the majority, Justice Douglas stated that "the staleness of both the basis for the investigation and its subject matter makes indefensible such exposure of one's

146. *Id.* at 549.
147. *Id.* at 551.
148. *Id.* at 557.
149. *Id.* at 546.
150. In addition to joining with Justice Goldberg's majority opinion, Justices Black and Douglas each concurred separately. *Id.* at 558, 559. Justice White joined in the dissent of Justices Harlan, Clark, and Stewart, and in addition dissented separately. *Id.* at 576, 583.
151. *Id.* at 558–85. However, each Justice expressed individual reasons for not making this distinction. Justice Black's concurring opinion expressed the view that the right of association extended just as fully to Communists as any other group. *Id.* at 558–59 (Black, J., concurring). Justice Douglas concurred on the ground that the "government is not only powerless to legislate with respect to membership in a lawful organization; it is also precluded from probing . . . such . . . groups that exist in this country, regardless of the legislative purpose sought to be served." *Id.* at 565 (Douglas, J., concurring). The dissent of Justices Harlan, Clark, Stewart, and White expresses the opinion that the investigation was properly within the Committee's interest in discovering evidence of subversive activities, even if the particular organization investigated was not itself subversive. *Id.* at 576–83 (Harlan, Clark, Stewart, and White, JJ., dissenting). Justice White dissented separately, deploring the barriers he felt this holding erected to stemming the spread of Communist subversion. *Id.* at 583–85 (White, J., dissenting).
152. 383 U.S. 825 (1966).
153. *Id.* at 826–28.

associational and political past — exposure which is objectionable and damaging in the extreme to one whose associations and political views do not command majority approval."[154] The first amendment cannot be infringed unless there is an overwhelming public necessity to do so. Certainly in the *Gibson* sense, no nexus existed here to justify the invasion of privacy. Justice Douglas, therefore, concluded that the state's interest was "too remote and conjectural to override the guarantee of the First Amendment that a person can speak or not, as he chooses, free of all governmental compulsion."[155]

Several dimensions of the first amendment defense become evident from the foregoing analysis of the doctrine's evolution. First, it would seem obvious that the primary claim under the first amendment is not basically one of invasion of personal conscience. Rather, the primary rationale is that consequences can stem from compulsory disclosure of political belief and association so adversely as to inhibit the full employment of free speech.[156] As the Court stated in *Louisiana v. NAACP,*[157] "where it is shown . . . that disclosure of membership results in reprisals against and hostility to the members, disclosure is not required."[158] Second, as long as the Court adheres to this "balancing test," even if narrowly construed as it was in *Gibson* and *De Gregory,* the defense can never really protect members of admittedly subversive groups. However, nonsubversive associations such as the NAACP, even though on occasion controversial, apparently can make effective use of the first amendment defense.[159]

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154. *Id.* at 828–29 (footnote omitted).

155. *Id.* at 830.

156. In order to successfully argue the "chilling effect" of governmental investigations, it must be demonstrated that individuals or groups have sustained or are in immediate danger of sustaining some direct injury. *See* Laird v. Tatum, 408 U.S. 1, 13 (1972), dealing with military intelligence surveillance of civilian political activity to assist in controlling possible civil disorders.

157. 366 U.S. 293 (1961).

158. *Id.* at 296.

159. A possible alternative to limiting investigative jurisdiction was indicated in the recent decision of Hentoff v. Ichord, 318 F. Supp. 1175 (D.D.C. 1970). The House Committee on Internal Security was preparing to release a report identifying 65 college campus speakers who allegedly were "New Left" revolutionaries. Before the committee report could be officially released, an injunction, based upon first amendment grounds of free speech and association, was sought to enjoin the committee members, Public Printer, and Superintendent of Documents from releasing the information. The court concluded that such a report would be a political "blacklist" designed to discourage invitations for future speaking engagements. 318 F. Supp. at 1182. The court, however, disclaimed any power to enjoin members of the committee from discussing the contents of the report on the floor of Congress, nor did it feel the judiciary had authority to prohibit reproducing the report in the *Congressional Record.* The court did, however, enjoin the Public Printer from printing and distributing the report. *See* Clark and Gittes, *The First Amendment, Congressional Investigations and the Speech or Debate Clause,* 40 U. Mo. K.C.L. REV. 108 (1971).

III. THE FOURTH AMENDMENT: CORE OF CONSTITUTIONAL PRIVACY

The most crucial provision of the Constitution protecting privacy, and the one most persistently identified with the concept, is the fourth amendment.[160] This fundamental ban upon "unreasonable" searches and seizures is based upon the premise that to breach the privacy of the individual is an extraordinary action; one that requires a number of safeguards to be satisfied before it can be undertaken.[161] While a general analysis of the Supreme Court's construction of the amendment is beyond the scope of this article, some persistent trends nonetheless can be indicated and discussed.

According to Jacob W. Landynski, the Supreme Court has had several options in interpreting the amendment. Noting that nowhere within the amendment is the term "unreasonable" defined, he has argued that there are three possible interpretations of the relationship between the fundamental clauses which compose the text of the amendment:[162]

> (1) that the "reasonable" search is one which meets the warrant requirements specified in the second clause; (2) that the first clause provides an additional restriction by implying that some searches may be "unreasonable" and therefore not permissible, even when made under warrant; or (3) that the first clause provides an additional search power, authorizing the judiciary to find some searches "reasonable" even when carried out *without* warrant.[163]

He suggests that the first part of the amendment's text "recognized as already existing a right to freedom from arbitrary governmental invasion of privacy and did not seek to create and confer such a right."[164] The first clause was designed to emphasize the importance of fulfilling the procedural requirements specified in the second clause. While "the second clause, in turn, defines and interprets the first, telling us the

160. *See* note 162 *infra*.

161. The requirement that (in the absence of exigent circumstances) a judicially authorized warrant must be obtained where practicable, is the most fundamental procedure designed to limit governmental intrusions into privacy. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443 (1971); Chimel v. California, 395 U.S. 752 (1969).

162. The text of the amendment reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

163. J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 42-43 (1966) [hereinafter cited as LANDYNSKI]. For a concise treatment of the amendment's English antecedents, drafting, and early interpretation, *see* N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937).

164. LANDYNSKI, *supra* note 163, at 43.

kind of search that is *not* 'unreasonable,' and therefore not forbidden, namely, the one carried out under the safeguards there specified."[165] Under this thesis, the first and second alternatives are in accord with the intended purpose of the amendment, though Landynski prefers the second.[166]

It is significant to note that from the Court's earliest interpretations of the amendment in the 1880's, it has chosen explicitly to link the concept of privacy to the fourth amendment. This is clearly indicated in the early case of *Boyd v. United States,*[167] which has proved to be one of the most significant pronouncements on the fourth amendment ever made. The case centered around the Federal Customs Revenue Act of 1874.[168] The pertinent section of the statute provided that, upon proper notice from a court, a defendant in fraud proceedings could be required to produce in court specified papers and documents of importance in the litigation. If the defendant failed to produce such papers, then the allegations made against him were to be considered confessed and affirmed. Obviously, a defendant under these conditions had little choice but to produce the requested papers.

In striking down this provision, Justice Bradley relied heavily upon English precedent on search and seizure, with particular emphasis upon the case of *Entick v. Carrington.*[169] He believed Lord Camden's decision in this case to be one of the "landmarks of English liberty,"[170] and to have been an important influence upon the framers of the Bill of Rights.[171] For Justice Bradley, the principles laid down in that case were "the very essence of constitutional liberty and security,"[172] and should not have been confined to the concrete facts of a physical invasion of a home and the carting away of private papers. He stated that these principles

> apply to all invasions, on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitute the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense — it is the invasion

165. *Id.*
166. *Id.*
167. 116 U.S. 616 (1886).
168. Act of June 22, 1874, ch. 390, § 5, 18 Stat. 187.
169. 19 *Howell's State Trials* 1029 (1765).
170. 116 U.S. at 626.
171. *Id.* at 626–30. *See* Trimble, *Search and Seizure Under the Fourth Amendment as Interpreted by the United States Supreme Court,* 41 KENT L.J. 196, 200 (1953).
172. 116 U.S. at 630.

> of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.[173]

And then, in the key clause of the opinion, in a statement that would lead to decades of controversy, Justice Bradley asserted:

> Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.[174]

Justice Bradley thus drew several vital conclusions about the fourth amendment. First, he construed the intent and spirit of the amendment to be the protection of an individual's rights to privacy and security. Second, Bradley anticipated the troublesome "mere evidence rule": while the government had a superior interest which entitled it to seize the instrumentalities of a crime, the fruits of crime or contraband, it could never have a legitimate claim upon one's private papers as *evidence* of crime only. Third, he stressed the interrelationship of the fourth and fifth amendments, an interpretation similar to Landynski's second thesis.[175] He stated that "the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment."[176] Therefore, such a procedure compelling the production of papers was inherently unreasonable in that it actually forced an individual to be a witness against himself. As a result, the presumption lay that certain types of searches were precluded even with a fully authorized search warrant.[177]

During the long and complex development of the amendment from the 1880's to the present, the Court never fundamentally deviated from Justice Bradley's original emphasis upon privacy. A number of cases in the late 1940's made frequent references to privacy and even to the developing interchangeability of the terms "privacy" and "fourth amendment."[178] A significant decision in this regard was *McDonald*

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173. *Id.*
174. *Id.*
175. *See* note 163 and accompanying text *supra.*
176. 116 U.S. at 633.
177. An interesting, but critical, analysis of this case is found in Nelson, *Search and Seizure: Boyd v. United States,* 9 AM. B. ASS'N J. 773 (1923).
178. *See, e.g.,* United States v. Jeffers, 342 U.S. 48, 52 (1951); United States v. Morton Salt, 338 U.S. 632, 651–52 (1950); Lustig v. United States, 338 U.S. 74, 78–79 (1949); Johnson v. United States 333 U.S. 10, 14 (1948); Davis v. United States, 328 U.S. 582, 587 (1946).

v. United States.[179] In that case, the police were suspicious that gambling was taking place in a hotel room. They surreptitously entered the building through an open window and, employing an open transom, observed gambling underway in an adjacent room.[180] Immediately, without a warrant, they arrested the gamblers and seized the paraphernalia as evidence.[181] In rebuking this procedure, Justice Douglas produced an important analysis of the relationship between the fourth amendment and privacy:

> This guarantee of protection against unreasonable searches and seizures extends to the innocent and guilty alike. It marks the right of privacy as one of the unique values of our civilization and, with few exceptions, stays the hands of the police unless they have a search warrant issued by a magistrate on probable cause supported by oath or affirmation.[182]

Later, Justice Douglas continued:

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe place for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home.[183]

Douglas insisted that in this situation a warrant should have been obtained, since it was obviously not an emergency: "We cannot allow the constitutional barrier that protects the privacy of the individual to be hurdled so easily."[184]

A most potent conception of privacy and its significance for a democratic society was contained in Justice Jackson's dissenting opinion in *Brinegar v. United States.*[185] The majority had upheld the validity of the warrantless search of an automobile, on the ground that there was probable cause for the search. But Justice Jackson, former prose-

179. 335 U.S. 451 (1948). *See generally* Magill, *Toward a More Liberal Construction of the Fourth Amendment,* 27 DICTA 13, 21–22 (1950).
180. 335 U.S. at 452–53.
181. *Id.* at 453.
182. *Id.*
183. *Id.* at 455–56.
184. *Id.* at 455.
185. 338 U.S. 160 (1949).

cutor at Nuremberg, detailed an argument for the importance of privacy with a poignancy that few opinions can match:

> These, I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one needs only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.[186]

Obviously for Jackson, privacy was not merely a sociological or philosophical concept, but something acutely necessary for democracy to function.

Several post-*Griswold* decisions have further indicated the extent to which the Supreme Court has recognized privacy as the central value protected by the fourth amendment.[187]

A. The Mere Evidence Rule

In 1967, the Supreme Court rejected the "mere evidence" exclusionary rule. The rule had its explicit establishment in the 1921 case of *Gouled v. United States,*[188] where it was determined that objects of "evidentiary value only" could never be lawfully seized.[189] While the Court believed that society had a greater proprietary interest pertaining to the implements of crime, its fruits, and contraband, the defendant's interest in his papers and other chattels exclusive of these categories could not be overcome simply because the government wished to use them as evidence.[190] This rule would seem to comply with Landynski's second thesis[191] in its interpretation of the fourth amendment: certain categories of searches are unreasonable irrespective of any warrant. Thus, "[i]t is arguable that the drafters of the Constitution intended to further protect a man's privacy by immunizing from seizure certain of his personal property."[192] In other words, just

186. *Id.* at 180–81 (Jackson, J., dissenting).
187. *See, e.g.,* Katz v. United States, 389 U.S. 347 (1967). *See also* notes 219–32 and accompanying text *infra.*
188. 255 U.S. 298 (1921).
189. *Id.* at 309–13.
190. *Id.* at 310. *See* Rintalla, *The Mere Evidence Rule: Limitations on Seizure Under the Fourth Amendment,* 54 CALIF. L. REV. 2099 (1966).
191. *See* note 163 and accompanying text *supra.*
192. Comment, *Limitations on Seizure of "Evidentiary" Objects: A Rule in Search of a Reason,* 20 U. CHI. L. REV. 319, 327 (1953).

as the exclusionary rule discouraged illegal searches by denying their fruits, the mere evidence limitation discouraged the breach of individual privacy by limiting the types of evidence that could be seized.[193]

In *Warden v. Hayden,*[194] the Court stripped away this protection from all but the testimonial and communicative types of evidence.[195] The Court allowed state police to seize any tangible property, in this case clothing, and to utilize it as evidence in a robbery prosecution.[196] It was interesting to note that in the process of distinguishing earlier precedent, the Court chose to speak to the heart of the fourth amendment's protection. Justice Brennan stated:

> We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts . . . . This shift in emphasis from property to privacy has come about through a subtle interplay of substantive and procedural reform.[197]

Since privacy was equally invaded by warranted searches for "mere evidence" as by seizure of traditional categories of evidence, the distinction based upon who had a greater property interest could not stand.[198] The seizure of clothing was no greater invasion of privacy than the seizure of a gun.[199] However, it was important to bear in mind that communicative evidence, such as private papers, which under the *Boyd* rationale also received the protection of the fifth amendment, could still be excluded at trial.[200]

Justice Douglas' dissent was significant in several regards. Of particular interest was his definition of privacy:

> Privacy involves the choice of the individual to disclose or to reveal what he believes, what he thinks, what he possesses. . . . The existence of that choice is the very essence of the right of privacy . . . . That dual aspect of privacy means that the individual should have the freedom to select for himself the time and circumstances when he will share his secrets with others and decide the extent of that sharing.[201]

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193. *See* United States v. Poller, 43 F.2d 911, 914 (1930).
194. 387 U.S. 294 (1967).
195. Evidence of a testimonial or communicative nature is objectionable on fifth amendment grounds; the question of its evidentiary value is never reached. *Id.* at 302–03.
196. *Id.* at 297–98.
197. *Id.* at 304.
198. *Id.* at 303–04.
199. *Id.* at 306–08.
200. Boyd v. United States, 116 U.S. 616, 633–35 (1886). *See* Shiffrin, *The Search and Seizure of Private Papers: Fourth and Fifth Amendment Considerations,* 6 LOY. L.A. L. REV. 275, 287 (1973). *See* notes 167–77 and accompanying text *supra.*
201. 387 U.S. at 324–25 (1967) (Douglas, J., dissenting) (footnote omitted).

A second important aspect of Douglas' dissent was its relationship to his opinion in *Griswold.*[202] In *Griswold,* Douglas had postulated a "zone of privacy" composed of various emanations from the different Bill of Rights guarantees.[203] In *Hayden,* Douglas spoke of *two* zones of privacy, one created by the first amendment and another created by the fourth amendment. Of the two, he felt the fourth amendment offered a much broader protection for privacy.[204]

B. Electronic Surveillance

It was not until 1967 that the Supreme Court seriously began to control the invasion of privacy accomplished by "bugging" and wiretapping. The Court recognized that existing law had simply not kept pace with the incessant advance of technology; privacy had fallen into second-class consideration. This process began with *Berger v. New York,*[205] where the Court voided a New York statute[206] which specified that judges could issue ex parte orders for electronic eavesdropping, provided a police officer or prosecutor supplied an "oath or affirmation" stating that there was a "reasonable" ground to "believe that evidence of crime [might] thus be obtained."[207] An exact description was required of the person or persons whose communications were to be intercepted. The resulting order was to specify the duration of the eavesdrop, and was limited to a 2-month period, unless renewed. Justice Clark, writing for the majority, agreed that the portion of the statute requiring a detached judicial authorization comported with the fourth amendment.[208] However, he found insufficient the lack of particularization required to secure an order — there was no specificity as to the supposed crime, the locus of the crime, or the things to be seized.[209] These deficiencies were of particular importance, since "eavesdropping involves an intrusion on privacy that is broad in scope."[210] In addition, the 2-month provision allowed a continuous "roving commission" to seize any and all conversations upon a single showing of a reasonable ground,[211] since, with the mere demonstration of a "public interest," the warrant could be extended another 2 months.[212] Furthermore, no notice was given to those whose

202. *See* notes 10–17 and 30–33 and accompanying text *supra.*
203. 381 U.S. at 485.
204. 387 U.S. at 222 (Douglas, J., dissenting).
205. 388 U.S. 41 (1967).
206. Law of April 12, 1958, ch. 676, § 813–a [1958] Laws of N.Y. 786.
207. 388 U.S. at 54.
208. *Id.*
209. *Id.* at 54–56.
210. *Id.* at 56.
211. *Id.* at 59.
212. *Id.*

conversations were seized, and there was no provision for return of the warrant to the issuing magistrate.[213]

With its decision 6 years earlier in *Silverman v. United States,*[214] the Court had recognized that conversations were protected by the fourth amendment. Consequently, New York's scheme had to be evaluated in comparison with the standards necessary for a constitutional warrant. Accordingly, Clark detailed a suggested list of "precise and discriminate" procedures necessary for the procurement of a valid warrant. First, the court order had to describe with particularity the type of conversation sought. Once the desired conversation was seized, the authorization expired.[215] Precise detail was necessary to prevent encroachment into unauthorized areas. Second, the warrant would only issue for one limited intrusion; it could not become a continuous authorization to seize for months at a time.[216] Third, for the warrant to be renewed, probable cause had to be demonstrated anew.[217] Finally, the officer had to make a return on the authorization indicating what items were seized and in what manner.[218] In this way, no greater invasion of privacy would be permitted than what was necessary under the particular circumstances. By comparison, the indiscriminate and open-ended New York procedure was condemned. Although the suggested procedure required much more effort on the part of governmental authorities and perhaps narrowed the potential usefulness of eavesdropping devices, it maintained the fourth amendment's dictate that independent judges alone are invested with the power to authorize and structure governmental intrusions into privacy.

The Court continued its delineation of the requirements for electronic eavesdropping in *Katz v. United States.*[219] Katz was convicted of interstate transmission of gambling information, largely upon evidence secured from a telephone booth bugged from the outside. The issue, therefore, was whether or not it was valid to bug the booth without a warrant, even though no physical penetration of the booth had taken place. Justice Stewart began by flatly declaring that the fourth amendment could not "be translated into a general constitutional right to privacy."[220] While the amendment did protect the individual and his privacy against certain types of governmental intrusion, its protections often had little or no relation to privacy per

213. *Id.* at 60.
214. 365 U.S. 505 (1961).
215. 388 U.S. at 56–57.
216. *Id.* at 57.
217. *Id.*
218. *Id.*
219. 389 U.S. 347 (1967).
220. *Id.* at 350.

se.[221] Similarly, other provisions of the Constitution — the first, third, and fifth amendments — protected other aspects of privacy. However, "the protection of a person's *general* right to privacy — his right to be let alone by other people — is, like the protection of his property and of his very life, left largely to the law of the individual states."[222]

Turning to the fourth amendment issue itself, Stewart dispelled the idea that the locus of activity determines the extent of privacy, thereby rejecting the former "constitutionally protected area"[223] argument. This theory was misguided since:

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[224]

The mere fact that Katz used a public telephone booth did not result in an automatic waiver of his right to privacy.[225] He had justifiably assumed that what he had said into the mouthpiece of the telephone would not be "broadcast to the world."[226] This was the same presumption he might make in using a telephone in his own home or office. Hence, the correct questions were: "For what purpose was the area being used? Was the individual reasonable in relying on the fact that his activities would remain private?"[227]

Furthermore, the Court finally disposed of the physical trespass concept, stating that the end result and not the method was the key factor:

> The Government's activities in electronically listening to and recording the petitioner's words violate the privacy upon which he justifiably relied while using the telephone booth and thus constitute a "search and seizure" within the meaning of the

221. *Id.*

222. *Id.* at 350–51 (footnote omitted). The tenth amendment gives the state broad authority to enact laws. U.S. CONST. amend. X. *See* New State Ice v. Lieberman, 285 U.S. 262, 302–03 (1932) (Brandeis, J., dissenting). *See also* Time, Inc. v. Hill, 385 U.S. 374 (1967); Kovacs v. Cooper, 336 U.S. 77 (1949).

223. In eavesdropping and wiretapping cases prior to *Katz*, the Supreme Court often had viewed as controlling the question of whether the governmental intrusion was trespassory. *See, e.g.*, Silverman v. United States, 365 U.S. 505 (1961); note 214 *supra*. *See also* On Lee v. United States, 343 U.S. 747 (1952); Goldman v. United States, 316 U.S. 129 (1942). Since a trespassory intrusion was only possible in an area where the defendant had a property interest, the view developed that the home, office, etc., were "constitutionally protected areas," so that if the government conducted an illegal electronic eavesdrop on the premises, the protection of the fourth amendment applied. Silverman v. United States, 365 U.S. 505, 509–12 (1961). As noted in the text, the Court in *Katz* specifically declined to adopt an "area" theory of fourth amendment protection involving wiretaps. 389 U.S. at 351–55.

224. 389 U.S. at 352.

225. *Id.* at 351–52.

226. *Id.* at 352.

227. Hendricks, *Eavesdropping, Wiretapping and the Law of Search and Seizure — Some Implications of the* Katz *Decision*, 9 ARIZ. L. REV. 428, 434 (1968).

> Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.[228]

Hence, the test for constitutionally protected privacy became "not whether there was physical trespass or whether the petitioner was in a constitutionally protected area, but whether petitioner intended to keep the seized evidence private or not."[229]

Consequently, the rule seemed to be that where a person had a reasonable expectation of privacy, a valid warrant was necessary in order to seize his words just as it would be to seize any other piece of evidence. "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures."[230] Justice Harlan's concurring opinion in *Katz* expanded on this notion.[231] Harlan concluded that if the place where the conversation occurred was one generally recognized as possessing a reasonable presumption of privacy, and the individual had a subjective expectation of privacy, then the presumption would be sound.[232]

One interesting question that has arisen out of the *Berger* and *Katz* decisions relates to wiretapping: Is the Court now saying that telephones can be tapped only as long as warrants are obtained? In *Olmstead v. United States,*[233] the Court had excluded wiretaps from fourth amendment protection, however, the premises on which that decision was based seem to have been subsequently overruled. First, in *Berger,* the Court reaffirmed its position from *Silverman v. United States,*[234] that the seizure of words, just like tangible evidence, is protected by the fourth amendment. Second, as a result of *Katz,*

228. 389 U.S. at 357. *See generally* Kitch, Katz v. United States: *The Limits of the Fourth Amendment,* 1968 SUP. CT. REV. 133.

229. Comment, *Constitutional Law — Right of Privacy — The Fourth Amendment Protection,* 14 LOY. L. REV. 370, 371 (1967-68).

230. 389 U.S. at 359.

231. *Id.* at 360-62 (Harlan, J., concurring).

232. *Id.* at 361. Ironically, Justice Black's dissent indicated the extent to which he felt the Court had recast the fourth amendment in terms of protective privacy. The Justice wrote: "With this decision the Court has completed, I hope, its rewriting of the Fourth Amendment, which started only recently when the Court began referring incessantly to the Fourth Amendment not so much as a law against *unreasonable* searches and seizures as one to protect an individual's privacy." *Id.* at 373 (Black, J., dissenting).

233. 277 U.S. 438 (1928). *See* W. MURPHY, WIRETAPPING ON TRIAL (1965), for an elaborate treatment of the decision. In his dissent in this case, Justice Brandeis indicated his belief that the fourth amendment was designed to protect privacy and must expand in scope to keep pace with the challenges to privacy resulting from new technology. "They [the founders] recognized the significance of man's spirtual nature, of his feelings and of his intellect. . . . They conferred, as against government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." 277 U.S. at 478 (Brandeis, J., dissenting).

234. 365 U.S. 505 (1961).

the former requirement of physical trespass into a constitutionally protected area has been discarded.[235] Instead, a new test, centering around privacy, has been created: (1) Did the individual exhibit a subjective expectation of privacy? and (2) was this expectation one that society would agree was reasonable?[236] Absent exigent circumstances, if these conditions are met, the only constitutional method whereby an individual's privacy can be invaded is by search warrant.[237] In addition, the presumption that wiretapping is now valid, given a proper warrant, is supported by a recent decision where, in a domestic security matter, the Court disallowed wiretaps undertaken without prior judicial approval.[238]

C. *Administrative Searches*

One of the most important dimensions of fourth amendment protection for privacy involves determining whether the scope of the amendment is confined to criminal searches. For a long period of time, the Court had maintained that potential criminal liability had to be involved before the fourth amendment could be invoked. This narrow perspective was very apparent in the Court's handling of administrative searches and inspections.[239] The initial consideration of the issue by the Supreme Court proved adverse to the right of privacy. In *Frank v. Maryland,*[240] the Court seemed to declare squarely that the fourth amendment only limited governmental intrusions for the purpose of securing criminal evidence. An inspector from the Baltimore health department was denied access to Frank's house to make a rodent

235. 389 U.S. at 350–52.

236. Interestingly, this *Katz* test was recently employed to vitiate the domestic reporting provisions of the Bank Secrecy Act, 31 U.S.C. §§ 1081–83 (1970). Stark v. Connally, 347 F. Supp. 1242 (N.D. Cal. 1972), *rev'd sub nom,* California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974). *See* Comment, *Bank Secrecy Act — Threat to First and Fourth Amendment Rights,* 27 RUTGERS L. REV. 176, 180 (1973). While the Supreme Court later overruled part of this district court decision, and upheld the domestic as well as the foreign reporting provisions of the statute, Justice Douglas' cogent dissent continued to rely upon the *Katz* standards as indicating that a significant aspect of privacy was involved which could only be overcome by a properly drawn warrant. *See* California Bankers Ass'n v. Shultz, 416 U.S. 21, 79 (1974) (Douglas, J., dissenting).

237. United States v. United States District Court, 407 U.S. 297, 317–21 (1972). However, the Third Circuit has upheld the validity of a warrantless wiretap in a case involving foreign security. United States v. Butenko, 494 F.2d 593 (3d Cir. 1974).

238. United States v. United States District Court, 407 U.S. 297, 309–45 (1972). At least one commentator, however, has argued against applying *Katz* to wiretapping. *See* Dash, *Katz-Variations on a Theme by Berger,* 17 CATH. U.L. REV. 296, 313 (1968).

239. *See* Hufstedler, *The Directions and Misdirections of a Constitutional Right to Privacy,* 26 THE RECORD 546 (1971), where the author states: "One of the principal reasons for the Court's failure to build the Fourth Amendment to Brandeis' specifications has been the Court's recurring inclination to confine the Amendment to the context of criminal law." *Id.* at 555.

240. 359 U.S. 360 (1959). *Frank* was subsequently overruled by the Court in Camara v. Municipal Court, 387 U.S. 523 (1967). *See* notes 256–65 and accompanying text *infra.*

inspection.[241] Denial of access was prohibited by city statutes and Frank was charged with a misdemeanor.[242]

Justice Frankfurter, writing for the majority, began his consideration of the issue with a discussion of the fourth amendment's background and evolution in Anglo-American legal history.

> Against this background two protections emerge from the broad constitutional proscription of official invasion. The first of these is the right to be secure from intrusion into personal privacy, the right to shut the door on officials of the state unless their entry is under proper authority of law. The second, and intimately related protection, is self-protection: the right to resist unauthorized entry which has as its design the securing of information to fortify the coercive power of the state against the individual, information which may be used to effect a further deprivation of life or liberty or property.[243]

Hence, the long evolution of the amendment made plain "that it was on the issue of the right to be secure from searches for evidence to be used in criminal prosecutions or for forfeitures that the great battle for fundamental liberty was fought."[244] Thus, even giving "the fullest scope to this constitutional right to privacy,"[245] Justice Frankfurter found that its protection could not be invoked in that situation for several reasons. Principally, the information was only sought for necessary health regulations.[246] In addition, the statute authorized search only upon reasonable suspicion, restricted searching to daylight hours, did not authorize the inspector to forcibly enter, and was the latest in a long history of similar regulatory schemes.[247] Clearly, the motive for the intrusion was foremost in the Court's mind. For Frankfurter, the statute touched only the periphery of fourth amendment privacy, and it was designed to make the least restriction on privacy commensurate with maintaining acceptable levels of public health.[248]

The dissenters, speaking through Justice Douglas, rejected this distinction based upon the motive for the search.[249] Douglas wrote: "The decision today greatly dilutes the right of privacy which every homeowner had the right to believe was part of our American heritage. We witness indeed an inquest over a substantial part of the Fourth

241. 359 U.S. at 361–62.
242. *Id.*
243. *Id.* at 365.
244. *Id.*
245. *Id.* at 366.
246. *Id.*
247. *Id.* at 366–71.
248. *Id.* at 367–72. *See* Riester and McMillen, *Administrative Inspection Procedures Under the Fourth Amendment — Administrative Probable Cause*, 32 ALBANY L. REV. 155, 159–63 (1967).
249. 359 U.S. at 378 (Douglas, J., dissenting).

Amendment."[250] The intent of the amendment, emphasized Douglas, was to protect the citizen "against unreasonable searches and seizures by government, whatever may be the complaint."[251] Its broad language made no exception for civil invasions of privacy:

> [The fourth amendment] was designed to protect the citizen against uncontrolled invasion of his privacy. It does not make the home a place of refuge from the law. It only requires the sanction of the judiciary rather than the executive before that privacy may be invaded. History shows that all officers tend to be officious; and health inspectors, making out a case for criminal prosecution of the citizen are no exception. . . . One invasion of privacy by an official of government can be as oppressive as another. . . . It would seem that the public interest in protecting privacy is equally as great in one case as another.[252]

In addition, in language foretelling his later penumbral approach in *Griswold,* Justice Douglas declared: "[T]hese three amendments [the first, fourth and fifth] are indeed closely related, safeguarding not only privacy and protection against self-incrimination but 'conscience and human dignity and freedom of expression as well.' "[253] To allow warrantless breaches of the privacy of one's home (irrespective of a legitimate motive) was to ignore the clear presumption of privacy within the document. Privacy was to be guarded against any invasion, not just those involving the search for criminal evidence.[254] While the criteria necessary for obtaining a health warrant were not the same as those for a criminal one, the warrant procedure must nevertheless be followed.[255]

Douglas' dissent remained only an appeal for the future of the fourth amendment until 1967. In *Camara v. Municipal Court,*[256] the Court moved to limit the motive distinction it had propounded in *Frank.* In *Camara,* the material facts were identical with those of

250. *Id.* at 374.
251. *Id.*
252. *Id.* at 381–82.
253. *Id.* at 376.
254. *See* Comment, *State Health Inspection and "Unreasonable Search," The* Frank *Exclusion of Civil Searches,* 44 MINN. L. REV. 513, 525 (1960).
255. In another case, the Court, by an equally divided vote, held the fourth amendment inapplicable to the denying of access to municipal officials performing a routine housing inspection. *See* Ohio *ex rel.* Eaton v. Price, 364 U.S. 263 (1960). *See also* Note, *Administrative Inspections and the Fourth Amendment — A Rationale,* 65 COLUM. L. REV. 288, 290 (1965); Comment, *An Inspector Calls — Must We Always Let Him In?, The Constitution and Privacy of the Home,* 5 S.D.L. REV. 40, 565–57 (1960).
256. 387 U.S. 523 (1967). In the companion case of See v. Seattle, 387 U.S. 541 (1967), the Court imposed the same warrant requirements upon fire inspections of a commercial warehouse. *See* Note, *Reasonableness of Municipal Ordinance Inspection Without Search Warrant,* 14 LOY. L. REV. 377 (1967–68); Comment, Camara *and* See*: Accommodation Between the Right of Privacy and the Public Need,* 47 NEBR. L. REV. 613 (1968).

Frank,[257] but the Court's reaction was somewhat different. Justice White obviously undertook his opinion with a somewhat broader conception of the fourth amendment than had Justice Frankfurter:

> The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. The Fourth Amendment thus gives concrete expression to a right of the people which is "basic to a free society."[258]

The Justice noted that it had long been a central principle that, with the exception of a few narrowly defined instances, "a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."[259] To exclude this protection from civil searches would, ironically, only allow one to enjoy his privacy if he were suspected of criminal activity. To Justice White, then, *Frank* had been incorrect: protection from unreasonable civil searches was *not* a peripheral interest of the fourth amendment.[260] Yet, this was not to say that no inspection could take place, or that, as *Frank* had argued, any effective inspection program would be hobbled, but only that such searches must have been authorized by a warrant if the request to inspect was rejected.[261] Obviously, most residents would not object to a properly conducted health inspection.[262]

Justice White then proceeded to outline the requirements necessary to secure a warrant in such a situation. After examining the purposes of such inspections in urban areas, he found that the necessary probable cause need only be based on the neighborhood — not the individual household as somehow specially set apart.

> Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (*e.g.*, a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the conditions of the particular dwelling. It has been suggested that so to vary the probable cause test from the standard applied in criminal cases would be to authorize a

257. Appellant, lessee of the ground floor of an apartment building, was suspected by the city housing inspector of using part of his leasehold as a residence, in violation of the building's occupancy permit. Appellant repeatedly refused to allow an inspection of his premises without a search warrant, and was arrested for violating the San Francisco Housing Code. Released on bail, he applied for a writ of prohibition, arguing that the inspection ordinance was unconstitutional for not requiring a search warrant. 387 U.S. at 525–27. *Compare* text accompanying notes 240–41 *supra*.

258. 387 U.S. 523, 528 (1967), *quoting* Wolf v. Colorado, 338 U.S. 25, 27 (1949).

259. 387 U.S. at 528–29.

260. *See* LaFave, *Administrative Searches and the Fourth Amendment: The* Camara *and* See *Cases*, 1967 SUP. CT. REV. 1, 37.

261. *See* Note, *Administrative Searches — Closing the Door on* Frank v. Maryland, 17 DE PAUL L. REV. 207, 216 (1967).

262. *See* 387 U.S. at 539.

> "synthetic search warrant" and thereby to lessen the overall protections of the Fourth Amendment. . . . But we do not agree. The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, there is probable cause to issue a suitably restricted search warrant.[263]

Therefore, as long as a reasonable basis existed for seeking to inspect a particular house, and as long as the search remained a relative limited invasion of the dweller's privacy, then sufficient probable cause existed to justify the warrant.[264] This was consistent with the intent of the fourth amendment — "to be free from unreasonable government invasions of privacy."[265]

It is beyond question that the fourth amendment constitutes the core of constitutional privacy, and this is particularly important when one realizes that these concepts have been intertwined as far back as English common law. While the Court has recently sanctioned several procedures which undermine privacy, namely "stop and frisk"[266] and bodily searches,[267] the overall policy thrust has clearly been in the direction of increased protection for privacy. Particularly significant as noted earlier, was the test promulgated in *Katz*: an individual is protected where he has a reasonable expectation of privacy. Equally significant has been the combined use of the first and fourth amendments to safeguard political privacy. The Court has recently said:

> National security cases, moreover, often reflect a convergence of First and Fourth Amendment values not present in cases of "ordinary" crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to con-

263. *Id.* at 538–39.

264. A similar type of balancing of interests was evidently at work in the recent decision of Wyman v. James, 400 U.S. 309 (1971). There, the Court held that a welfare recipient, notified sufficiently in advance, could not refuse to admit a caseworker to her home for purposes both "rehabilitative and investigative." *Id.* at 317. The Court seemed to base its holding upon the presumption that the refusal to allow a home visit did not result in criminal prosecution, only termination of assistance, and as such, did not involve the fourth amendment. The Court attempted to distinguish the *Camara* and *See* holdings on the basis of possible prosecution for violations, but as one commentator has noted, the opinion "is logically unacceptable and totally inconsistent with the theory underlying *Camara*." Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since* Camara *and* See, 61 CALIF. L. REV. 1011, 1028–29 (1973).

265. U.S. CONST. amend. IV. *See* 387 U.S. at 539. *See also* Meyers, *Administrative Inspection of Health Facilities as Unreasonable Searches,* 22 FOOD DRUG COSM. L.J. 456, 465–67 (1967).

266. *See* Sibron v. New York, 392 U.S. 40 (1968); Terry v. Ohio, 392 U.S. 1 (1968). *See also* Schwartz, *Stop and Frisk,* 58 J. CRIM. L.C. & P.S. 433 (1967); Note, *Stop and Frisk: Dilemma for the Courts,* 41 U. So. CAL. L. REV. 161 (1968); Comment, *Stop and Frisk: A Perspective,* 53 CORNELL L. REV. 899 (1968).

267. *See* Schmerber v. California, 384 U.S. 757 (1966); Breithaupt v. Abram, 352 U.S. 432 (1957). *See also* Note, *Constitutionally Permissible Invasions of the Body,* 39 OKLA. B.J. 1904 (1966).

> stitutionally protected speech . . . Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs.[268]

This language parallels the "umbrella effect" urged by Professor Emerson: the first amendment can link up with other provisions of the Bill of Rights, expanding and strengthening their protections by this unity.[269] Nevertheless, the Supreme Court has persistently relied most heavily upon the fourth amendment — and its protection for the privacy of location — as its most substantial basis for safeguarding individual privacy.

IV. THE FIFTH AMENDMENT RIGHT TO SILENCE

As the preceding discussion has indicated, the constitutional right to privacy is composed of several different Bill of Rights guarantees protecting various aspects of individual and group privacy. The first amendment preserves the anonymity of political belief and association, while the fourth amendment is most concerned with safeguarding the locus of privacy. But the most intimate aspects of privacy, the conscience and innermost thoughts of the individual, are equally in need of constitutional protection. It is the fifth amendment's ban against compulsory self-incrimination, or the forcing of an individual to divulge information that only he may know, that renders the constitutional protection of privacy complete. The fifth amendment's right to silence safeguards what some deem to be the most crucial aspect of individual privacy, that manifestation of privacy which is the keynote of individuality and democracy.

A. The Policy of the Privilege

Any analysis of the fifth amendment's role in protecting privacy must necessarily include some discussion of the policy behind the concept of immunity from self-incrimination. Probably the most complete catalogue of reasons supporting the privilege was offered by Justice Goldberg in his opinion in *Murphy v. Waterfront Commission*:[270]

> It reflects many of our fundamental values and most noble aspirations; our unwillingess to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our prefer-

268. United States v. United States District Court, 407 U.S. 297, 313-14 (1972).

269. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 15 (1970). Emerson's concept is linked to political surveillance in Meisel, *Political Surveillance and the Fourth Amendment*, 35 U. PITT. L. REV. 53, 61 (1973).

270. 378 U.S. 52 (1964).

> ence for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load" . . . ; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life" . . . ; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."[271]

In a most influential volume, *The Fifth Amendment Today*,[272] Dean Griswold declared that "the privilege against self-incrimination is one of the great landmarks in man's struggle to make himself civilized."[273] First, the privilege does away with the feasibility of using torture to force an individual suspect to confess.[274] It also renders the criminal justice system more humane and accurate, since coerced confessions are often incorrect as well as cruel.[275] Second, the privilege underlines the basic conception of an adversary, as contrasted with an inquisitorial, system of criminal law.[276] Since the legal system cannot simply rely upon the defendant to provide evidence, it must search out sufficient proof itself to demonstrate reasonable cause. This, as a result, allows the potential defendant to remain free from interference until society can justify in a court of law its right to imprison him.[277] This is similar to the "fair-fight" theory: in order to imprison an individual, society ought to have more proof than simply the defendant's own words to convict him.[278]

Perhaps the most significant justification for the privilege, protection for privacy, was expressed by Griswold in the following language:

> Where matters of a man's belief or opinions or political views are essential elements in the charge, it may be most difficult to get

271. *Id.* at 55 (citations omitted). *See also* MacNaughton, *The Privilege Against Self-Incrimination: Its Constitutional Affectation, Raison d'Etre and Miscellaneous Implications*, 51 J. CRIM. L.C. & P.S. 138 (1960) [hereinafter cited as MacNaughton].

272. E. GRISWOLD, THE FIFTH AMENDMENT TODAY (1955) [hereinafter cited GRISWOLD]. *See also* Griswold, *The Fifth Amendment*, 39 MASS. L.Q. 44 (Apr. 1954); Griswold, *The Fifth Amendment as a Symbol*, 28 CONN. B.J. 451 (1954); Griswold, *The Fifth Amendment Today*, 39 MARQ. L. REV. 191 (1956); Griswold, *The Right to be Let Alone*, 55 NW. U.L. REV. 217 (1960).

273. GRISWOLD, *supra* note 272, at 7.

274. *See* Connery, *The Right to Silence*, 39 MARQ. L. REV. 180, 184–85 (1956). The due process clause of the fourteenth amendment would also forbid the use in state court of a confession obtained by torture. *See, e.g.*, Brown v. Mississippi, 297 U.S. 278 (1936).

275. *See* Annot. 24 A.L.R. 703 (1923).

276. Griswold, *supra* note 272, at 8.

277. MacNaughton, *supra* note 271, at 146–49.

278. *Id.* at 148–49.

> evidence from sources other than the suspected or accused person himself. Hence, the significance of the privilege over the years has perhaps been greatest in connection with resistance to prosecution for such offenses as heresy or political crimes. In these areas the privilege against self-incrimination has been a protection for freedom of thought and a hindrance to any government which might wish to prosecute for thoughts and opinions alone.[279]

Justice Fortas, as well, noted, before his ascendance to the Court, that the privilege arose to block the power of government to invade the mind of the individual and "take dominion of his will."[280] "There is little difference in theory, I suggest, between breaking into a man's house and forcing an entry into his mind to compel him to testify against himself."[281] In short, the privilege is "protection from unlimited inquiry into private affairs under the guise of law."[282] To grant the government unlimited power to breach the privacy of a man's mind is not only to undermine the privilege's long battle for "personal dignity against collective might,"[283] but to annihilate the very citadel of individuality and independent judgment.[284]

This intimate relationship between privacy and self-incrimination has been pointedly discussed by Dean McKay.[285] For him, two arguments favor a continued broad interpretation of the fifth amendment privilege. The first is the need to insure morality in the operations of government and integrity in the workings of the judicial system.[286] "The second principal argument in favor of continued liberal interpretation of the privilege against self-incrimination arises out of the concern for individual privacy that has always been a fundamental tenet of the American value structure."[287] While a relationship between the amendment and privacy can be traced back to *Boyd v. United States*[288] in 1886, it is the recent, ever-increasing demand for information by government, especially legislative investigations, that has made the fifth amendment crucial to the protection of privacy of belief, par-

279. GRISWOLD, *supra* note 272, at 8–9.

280. Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum,* 25 CLEV. B. ASS'N J. 91, 96–98 (1954).

281. *Id.* at 99.

282. Imlay, *The Paradoxical Self-Incrimination Rule,* 6 MIAMI L.Q. 147 (1952).

283. Kenealy, *Fifth Amendment Morals,* 3 CATH. LAW. 340, 342 (1957).

284. The privilege has also been justified on natural law grounds. *See* J. ANTIEAU, RIGHTS OF OUR FATHERS 104–08 (1968); Connery, *Morality and the Fifth Amendment,* 3 CATH. LAW. 137 (1957); McManus, *The Natural Law and the Fifth Amendment,* 3 CATH. LAW. 6 (1957).

285. McKay, *Self-Incrimination and the New Privacy,* 1967 SUP. CT. REV. 193 [hereinafter cited as McKay].

286. *Id.* at 209–10.

287. *Id.* at 210.

288. 116 U.S. 616. *See* notes 167–77 and accompanying text *supra.*

ticularly since the Supreme Court has been hesitant to allow a full first amendment defense of silence.[289] As Dean McKay stated:

> [R]ecently an awareness has developed of the relationship between the First and Fifth Amendments. It should not be difficult to understand that the Fifth Amendment, rooted as it is in part in the struggle in England during the fifteenth and sixteenth centuries to achieve freedom of conscience and freedom of religions, bears a close relationship to the Free Exercise Clause of the First Amendment. The First Amendment notion that no man may be compelled to worship or to speak in any particular way — or at all — may be regarded as an enlarged version of the more specific Fifth Amendment notion that no man shall be required to convict himself out of his own mouth. If the right to speak and write without official restraint is guaranteed by the First Amendment, as all agree is the case, does it not follow that there is a parallel freedom not to speak and not to write? This may be described as a freedom of silence . . . .[290]

Yet, as Charles Nutting has correctly argued, neither the first nor the fifth amendments alone can fully protect privacy; complete protection will only result when the interest in privacy is recognized for its own significance and safeguarded accordingly.[291]

The Supreme Court has chosen to interpret the "in any criminal case"[292] provision of the fifth amendment broadly, so that the general principle behind the privilege can be fully implemented. This has resulted in an expanded number of situations in which one can interpose the constitutional ban of silence between himself and government: in civil proceedings,[293] grand jury hearings,[294] and Congressional investigative hearings.[295] Yet the Court, while extending the privilege, has

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289. *See* notes 134–39 and accompanying text *supra.*

290. McKay, *supra* note 285, at 212.

291. Nutting, *The Fifth Amendment and Privacy,* 18 U. PITT. L. REV. 533, 543–44 (1957). *But see* HOOK, COMMON SENSE AND THE FIFTH AMENDMENT 121–23 (1963).

292. The amendment provides:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled *in any criminal case* to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. CONST. amend. V (emphasis added).

293. *See, e.g.,* McCarthy v. Arndstein, 266 U.S. 34 (1924).

294. *See, e.g.,* Blau v. United States, 340 U.S. 159 (1950). *But see* Kastigar v. United States, 406 U.S. 441 (1972); Comment, *The Fifth Amendment and Compelled Testimony: Practical Problems in the Wake of* Kastigar, 19 VILL. L. REV. 470 (1974).

295. *See, e.g.,* Emspak v. United States, 349 U.S. 190 (1955); Quinn v. United States, 349 U.S. 155 (1955). *See also* Coward, *The Fifth Amendment: Its Use in Congressional Investigations,* 44 A.B.A. J. 433 (1958); Pollitt, *The Fifth Amendment Plea Before Congressional Committees Investigating Subversion,* 106

also recognized some significant limitations upon the fifth amendment's protection for privacy.

B. Immunity Statutes

A very significant limitation upon the potential of the fifth amendment to protect privacy has emerged with the evolution of immunity statutes which compel an individual to testify in exchange for a guarantee against using his statements as evidence. The theory behind these statutes is that the right against self-incrimination is personal to the witness, and if he is given immunity coextensive in scope with the privilege, he must testify.[296] Repeatedly, the Court has insisted that the privilege does not foreclose disclosures of an infamous, degrading or embarrassing nature:[297] "What is protected and guaranteed in the Fifth Amendment is not silence but non-self-incrimination."[298] Consequently, if immunity from criminal prosecution is granted, the dictates of the fifth amendment are satisfied, and society's interest in gathering vital information outweighs any moral scruples as to silence. This thesis is usually accompanied by the argument that the value of the information so obtained also justifies any unpleasant ramifications — infamy, obloquy, or destruction of reputation — the individual may suffer.[299] In short, if society is willing to pay the price of immunity from prosecution, then a citizen no longer has the right to stand upon his constitutional right to silence.

Until recently, the Supreme Court had adhered to certain basic premises in its handling of the immunity issue. Of prime importance was the nature of the immunity granted. The compelled evidence could not be used either directly or to search out other derivative evidence ("use" immunity),[300] and the immunity also had to include a ban on any prosecution at all related to the disclosed information ("transactional" immunity).[301]

U. PA. L. REV. 1117 (1958); Smith, *The Privilege of Silence and the Legislative Process,* 41 GEO. L.J. 330 (1953); Zeserson, *Fifth Amendment Waiver in Congressional Investigations,* 18 N.Y.U. INTRA. L. REV. 62 (1962).

296. *See, e.g.,* Kastigar v. United States, 406 U.S. 441 (1972); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964). *See* notes 314–16 and accompanying text *supra. See* notes 270–71 and accompanying text *supra.*

297. *But see* LEVY, ORIGINS OF THE FIFTH AMENDMENT 317 (1968), where the author argues emphatically that as early as 1679, the common law privilege was meant to protect against infamy and obloquy as well as incrimination.

298. S. HOFSTADTER, THE FIFTH AMENDMENT AND THE IMMUNITY ACT OF 1954 18 (1956).

299. Note, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope,* 72 YALE L.J. 1568, 1598 (1963).

300. *See* Counselman v. Hitchcock, 142 U.S. 547 (1892).

The primary statement of this position is found in *Ullmann v. United States.*[302] The case arose under the Immunity Act of 1954,[303] which compelled witnesses in national security cases, upon the approval of a district court, to testify before courts, grand juries, and committees of Congress.[304] A federal grand jury, inquiring into criminal espionage and conspiracy, called Ullmann as a witness and granted immunity, yet Ullmann refused to testify.[305] Ullmann argued that immunity from criminal prosecution was not sufficient, for by testifying he opened himself up to such manifold ramifications as possible loss of employment, expulsion from his union, compulsory state registration and investigation, limitation on his ability to secure passports, and general public opprobium.[306] Justice Frankfurter, speaking for the majority, rejected this contention, reasoning that such consequences were not criminal penalties within the meaning of the fifth amendment,[307] and the amendment's protection only extended to criminal prosecutions. In short, since immunity displaced the danger, the reasons for the privilege ceased, and so the privilege ceased.

For the minority, Justice Frankfurter's reading of the privilege was far too narrow. Justice Douglas' lengthy dissent, concurred in by Justice Black, pointed out the dilemma of those who favor an impregnable area of constitutional silence.[308] Justice Douglas cogently explained the many penalties that could result from such forced testimony. These penalties — loss of job, forced registration as a subversive, and so forth — were "real and dread uncertainties that the Immunity Act did not remove."[309] In reality, "the privilege of silence was exchanged for a partial, undefined, vague immunity. It meant that Congress had granted far less than it had taken away."[310] The purpose of the amendment was something broader than mere protection against ultimate criminal prosecution.

> The guarantee against self-incrimination contained in the Fifth Amendment is not only a protection against conviction and prosecution but a safeguard of conscience and human dignity and

301. *See* Brown v. Walker, 161 U.S. 591 (1896).
302. 350 U.S. 422 (1956).
303. Act of Aug. 20, 1954, ch. 769, § 1, 68 Stat. 745.
304. The 1954 act evoked a great deal of controversy. *See, e.g.,* Boudin, *The Immunity Bill,* 42 GEO. L.J. 497 (1954); Rogge, *The New Federal Immunity Act and the Judicial Function,* 45 CALIF. L. REV. 109 (1957); Comment, *The Privilege Against Self-Incrimination Versus Immunity: Proposed Statutes,* 41 GEO. L.J. 511 (1953); Comment, *Immunity from Self-Incrimination Under the Federal Compulsory Testimony Act,* 46 J. CRIM. L.C. & P.S. 673 (1955).
305. 350 U.S. at 423–25.
306. *Id.* at 502.
307. *Id.* at 430–31.
308. *Id.* at 440 (Douglas & Black, JJ., dissenting).
309. *Id.* at 445.
310. *Id.*

> freedom of expression as well. . . . The evil to be guarded against was partly self-accusation under legal compulsion. But that was only part of the evil. The conscience and dignity of man were also involved. So too was his right to freedom of expression guaranteed by the First Amendment. The Framers, therefore, created the federally protected right of silence and decreed that the law could not be used to pry open one's lips and make him a witness against himself.[311]

Infamy and disgrace were very real prices to pay for forced testimony. Justice Douglas wrote, "The critical point is that the Constitution places the right of silence *beyond the reach of government.* The Fifth Amendment stands between the citizen and his government."[312]

Recently, in *Kastigar v. United States,*[313] the Court reassessed its position and determined that use immunity, granted as part of the Organized Crime Control Act of 1970,[314] was alone sufficient to compel a witness to testify. Transactional immunity was held to be outside the scope of the fifth amendment, and hence not constitutionally mandated.[315] Thus, the *Kastigar* holding significantly restricted fifth amendment protection by enabling the government to probe the privacy of an individual's mind as long as use immunity has been granted.[316]

In analyzing this trend away from privilege in favor of immunity statutes, former United States Attorney General Brownell has suggested that the change "reflects in part the view of some attorneys and legal scholars that privilege against self-incrimination was somewhat outmoded and should be strictly limited."[317] Samuel Hofstadter has argued that immunity statutes strike a realistic "golden mean" between the fifth amendment and the rights of society, which obviates the necessity of repealing the amendment.[318] But as another commentator has so effectively noted, immunity statutes allow great harm to result from the compulsory testimony of political deviants.[319] Historically, the fifth amendment has been intimately involved in the evolution of protections for the right to be silent in the face of government demands for an individual's most confidential information, his private

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311. *Id.* at 445–46 (footnote omitted).
312. *Id.* at 454 (emphasis in original).
313. 406 U.S. 441 (1972).
314. Pub. L. No. 91–452, 84 Stat. 922 (codified in scattered sections of U.S.C.).
315. *Id.* at 453. *See* Comment, *The Unconstitutionality of Use Immunity: Half a Loaf is Not Enough,* 46 U. So. CAL. L. REV. 202 (1972).
316. This "exchange theory" is discussed in Dixon, *The Fifth Amendment and Federal Immunity Statutes,* 22 GEO. WASH. L. REV. 447, 555–64 (1954).
317. Brownell, *Immunity from Prosecution versus Privilege Against Self-Incrimination,* 28 TUL. L. REV. 1, 4 (1953).
318. S. HOFSTADTER, *supra* note 296, at 18.
319. Rogge, *Compelling the Testimony of Political Deviants,* 55 MICH. L. REV. 375, 404–12 (1957).

thoughts.[320] Yet today, that historic protection can be circumvented almost as easily as if it did not exist. As one eminent practitioner insists, the proponents of such statutes should be subjected to a heavy burden of proof. "They must show why our Congress needs the extraordinary power to inquire into private affairs and compel incriminating testimony, a power without which this nation has well survived."[321]

C. *Compulsory Production of Records*

As the Supreme Court's decision in *Boyd v. United States*[322] indicated, one's personal papers are of a particularly sensitive nature and they may be equally as effective in incriminating the individual as his spoken words. Therefore, the Supreme Court has continued to maintain from 1886 to the present that one's private papers cannot be seized and utilized as evidence. Furthermore, this position has been maintained even in light of the Court's otherwise complete destruction of the mere evidence rule. However, the Court has allowed corporate records — some of which are held to be quasi-public documents — to be seized and used as evidence.[323] This distinction has been based upon the rationale that corporations do not enjoy the right to be free from self-incrimination, and consequently the "intimate relationship" between the fourth and fifth amendments is lacking.[324]

A related problem pertains to records required by law to be kept in order to engage in certain types of businesses. In *Shapiro v. United States*,[325] the Office of Price Administration had required specified non-corporate businesses to maintain certain records which would be inspected upon occasion as part of its price-regulating activities. Shapiro's records were utilized to search out incriminating evidence.[326] Shapiro argued that this procedure violated his right to be free from compulsory self-incrimination, and further that a particular provision of the statute immunized him from any prosecution based upon evidence so derived.[327] The Court, speaking through Chief Justice Vinson, rejected these contentions. Congress, as part of its overall price-

320. *Id.* at 375. *See also* O. ROGGE, THE FIRST AND THE FIFTH 138–203 (1960).
321. Boudin, *supra* note 304, at 507 (footnotes omitted).
322. 116 U.S. 616 (1886). *See notes* 167–77 and accompanying text *supra*.
323. *See, e.g.*, United States v. White, 322 U.S. 694 (1944); Wheeler v. United States, 226 U.S. 478 (1913); Wilson v. United States, 221 U.S. 361 (1911); Hale v. Henkel, 201 U.S. 43 (1906).
324. United States v. White, 322 U.S. 694, 698–700 (1944).
325. 335 U.S. 1 (1948). *See* Note, *Application of the Self-Incrimination Clause to the Compulsory Production of Books and Papers Required to be Kept by Statute*, 24 IND. L.J. 567 (1949).
326. 335 U.S. at 3–6.
327. *Id.* at 4–7, 22.

regulation scheme, required these records to be maintained as a means of enforcing the statute.[328] It clearly did not intend to frustrate this enforcement mechanism by granting immunity to those who complied with the record-keeping requirement.[329] The immunity provision of the regulation was only to be used to secure evidence which was considered to be privileged.[330]

More importantly, the Chief Justice argued that such records, whose keeping was statutorily mandated, were outside the scope of the fifth amendment's protection.[331] Citing *Davis v. United States*,[332] where gasoline ration coupons were found not to be private papers when held by an individual acting in a custodial capacity, Vinson laid down the broad principle that records required by law to be kept were quasi-public documents and thus not privileged:

> It may be assumed at the outset that there are limits which the Government cannot exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record keeper himself. But no serious misgiving that those bounds have been overstepped would appear to be evoked when there is a sufficient relation between the activity sought to be regulated and the public concern so that the government can constitutionally . . . require the keeping of particular records, subject to inspection by the Administrator.[333]

Shapiro, regulated under a comprehensive scheme to control commodity price levels in a time of emergency, clearly a matter of "public concern," was subject to the record-keeping requirement. Thus, the resulting records could not be characterized as privileged matter protected by the fifth amendment.

In his dissent, Justice Frankfurter expressed the concern that the Court's holding had great potential for future abuse. He suggested that the required-records doctrine might attach whenever Congress deemed an activity to be an "appropriate subject of governmental regulation."[334] However, simply incanting the phrase "required to be kept by law" did not justify the government's undertaking inroads upon the protection of the privilege.[335] Perhaps, had Shapiro been involved in utilities or with public property, the issue might have been different.

328. *Id.* at 8.
329. *Id.* at 31–32.
330. *Id.* at 30–31.
331. *Id.* at 32–34.
332. 328 U.S. 582 (1946).
333. 335 U.S. at 32.
334. *Id.* at 50–55 (Frankfurter, J., dissenting).
335. *Id.* at 67.

But Justice Frankfurter found the public interest nexus in this case to be too far removed to justify breaching the fifth amendment.

> If Congress by the easy device of requiring a man to keep the private papers he has customarily kept can render such papers "public" and non-privileged, there is little left to either the right of privacy or the constitutional privilege.[336]

In a separate dissent, Justices Jackson and Murphy also evidenced their distaste for this potential power which might allow Congress to require that a citizen keep an account of his own "deeds and misdeeds," and then, upon demand, surrender these papers to help incriminate himself.[337]

Although it can be argued that *Shapiro* was the result of the historical circumstances of the drastic need to remedy economic instability in the postwar nation, Congress has simply assumed that regulatory statutes with similar provisions could be passed in many other economic areas.[338] This is understandable, if not commendable, given the welfare state's ever-growing demand for information. Fortunately, for the most part, the required-records doctrine has been limited to areas other than political and personal beliefs.[339] But as Professor Meltzer has suggested, *Shapiro*'s vague mandate presents the potential for much more damaging applications of the doctrine.[340] It is always possible to have an ostensibly legitimate purpose disguise more insidious motives. Even a perfectly legitimate motive may yield information that could be used for improper activities. In response to this danger, Professor Meltzer has suggested a test by which a balance would be struck between legitimacy of government purpose other than gaining confessions, and business privacy, which would be accorded a lesser weight than personal privacy.[341] However, as the experience under the first amendment balancing rationale suggests,[342] the governmental interest often would be held paramount in importance.[343]

Though phrased in more absolute language than the fourth amendment, the fifth amendment has been interpreted by the Supreme Court as providing a less comprehensive protection of privacy. Throughout its history, the privilege has been utilized in preventing compulsory governmental probing of the privacy of the individual's innermost seat

336. *Id.* at 70.
337. *Id.* at 70–71 (Jackson & Murphy, JJ., dissenting).
338. *See* Note, *Books and Records and the Privilege Against Self-Incrimination,* 33 BROOKLYN L. REV. 70, 97 (1966).
339. *See* Note, *Required Information and the Privilege Against Self-Incrimination,* 65 COLUM. L. REV. 681 (1965).
340. Meltzer, *Required Records, the McCarren Act, and the Privilege Against Self-Incrimination,* 18 U. CHI. L. REV. 687 (1951).
341. *Id.* at 714–15.
342. *See* notes 109–23 & 134–39 and accompanying text *supra.*
343. *But see* Gerstein, *Privacy and Self-Incrimination,* 80 ETHICS 87, 89 (1970).

of individuality — his conscience and beliefs. Yet, in several key lines of decisions, most notably with immunity statutes and the required-records doctrine, the Court has sanctioned major incursions into this area of constitutional protection. Nevertheless, the scope of the fifth amendment, even as currently interpreted, provides a most invaluable and necessary counterpart to the other components of constitutional privacy.

V. CONCLUSIONS: ABORTION AND PRIVACY

Several conclusions emerge from the previous discussion. Initially, there now can be little doubt as to the existence of a fundamental constitutional right to privacy. Yet this recognition only leads to a number of secondary questions. Is there one right to privacy, a "zone of privacy," as Justice Douglas' language in *Griswold* implied? Or are there several varieties of privacy protected by different aspects of the Bill of Rights? The answer at this point of development, oddly enough, seems to be yes to both alternatives. Each of the three amendments discussed above protects a different aspect of privacy. The first amendment protects political beliefs and the privacy of association; the fourth amendment safeguards the locus, vis-à-vis the individual, of privacy; and the fifth amendment shelters the innermost thoughts and beliefs of the individual. On occasion, usually in situations involving free speech, several of these individual guarantees may combine to give an "umbrella" effect, mutually reinforcing each other. For example, in *Stanley v. Georgia,*[344] the issue was whether the state could punish the mere possession of obscene matter within the privacy of the home. In striking down this action, the Court reinforced its first amendment position recognizing the right to receive information and ideas by invoking fourth amendment privacy of location as essential for implementing free speech:

> Moreover, in the context of this case — a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home — that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwarranted governmental intrusions into one's privacy.[345]

A similar type of interlocking was demonstrated in *United States v. United States District Court.*[346] However, there the first amendment

344. 394 U.S. 557 (1969). *See* Katz, *Privacy and Pornography:* Stanley v. Georgia, 1969 SUP. CT. REV. 203.

345. 394 U.S. at 564.

346. 407 U.S. 297 (1972). *See* note 238 and accompanying text *supra.*

reinforced the fourth rather than the reverse situation found in *Stanley*. Therefore, in most situations, it will be possible for the Court to protect privacy by invoking one or more of the key Bill of Rights protections.

But what then of the comprehensive right to privacy enunciated in *Griswold*? The Court has spoken only twice about this type of privacy since that landmark decision was handed down. In *Eisenstadt v. Baird,*[347] the Court expanded *Griswold* to include the distribution of contraceptive devices and information to unmarried persons:

> If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[348]

However, the Court's opinion in *Eisenstadt* seemed to be at least equally based upon equal protection grounds — if married individual's have access to contraceptives, then so must unmarried individuals.[349]

The second invocation of the general constitutional right to privacy occurred in the recent abortion decisions.[350] In establishing the unhindered right to abortion during the first trimester of pregnancy, the Court concluded that the offending statutes had attempted to infringe upon petitioners' privacy with insufficient justification.[351] Whether the source was the due process clause or the ninth amendment,[352] the Court spoke about a general right to privacy — at least

347. 405 U.S. 438 (1972).
348. *Id.* at 453.
349. *Id.* at 452–55.
350. Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973). *See* Comment, *The Right to Privacy: Does it Allow a Woman the Right to Determine Whether to Bear Children?,* 20 AM. U.L. REV. 136 (1970); Note, *The Abortion Cases: A Return to* Lochner, *or a New Substantive Due Process?,* 37 ALBANY L. REV. 776 (1973). On abortion as regulated by law generally, *see* Means, *The Phoenix of Abortion Freedom: Is a Penumbral or Ninth-Amendment Right about to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common Law Liberty?,* 17 N.Y.L.F. 335 (1971). For sharp criticism of the decisions, particularly relating to the Court's declaring the unborn child not to be a person within the meaning of the fourteenth amendment, *see* Rice, *The Dred Scott Case of the Twentieth Century,* 10 HOUS. L. REV. 1059 (1973).
351. 410 U.S. at 163–66.
352. *See* Clark, *supra* note 34, at 108–10. Justice Blackmun, writing for the majority in Roe v. Wade, stated that for the purposes of that decision it did not matter whether the right to privacy was "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, *as we feel it is,* or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people. . . ." Roe v. Wade, 410 U.S. 113, 153 (emphasis added). It has been argued that the italicized language indicated a preference by the present Court for Justice Harlan's "fundamental rights" theory as a basis for the right to privacy. Note, *On Privacy: Constitutional Protection for Personal Liberty,* 48 N.Y.U.L. REV. 670, 697–98 (1973). *See* notes 46–56 and accompanying text *supra.* However, it also has been asserted that the language simply reaffirmed the penumbral theory as to the origin of the right. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 928 (1973). The author considers the Court's statement to be simply a recognition that multiple constitutional theories have been put forward to justify the right to privacy, and, with the exception of not resting the right exclu-

in sex, family, and marital matters.[353] Several aspects of these opinions are significant. First, the Court clearly staked its position on a long series of cases recognizing privacy as a general desideratum. In short, the Court espoused the presumption that constitutional privacy existed and could not be infringed unless competing considerations were overwhelming. Second, the Court very carefully indicated that the right to privacy was not absolute: "The Court's decisions recognizing a right of privacy also acknowledged that some state regulation in areas protected by that right is appropriate."[354] Therefore, if the state could demonstrate some "compelling interest" — such as safeguarding health, maintaining medical standards, and protecting potential life — then the right to privacy would have to be balanced against these competing needs.[355]

It is not surprising that the Court has chosen to rely upon a balancing test, although such a test may be quite difficult to apply. Balancing has been the device whereby the Court has determined the extent of privacy under the first amendment (the need of government for certain types of information), the fourth amendment (emergency situations, stop and frisk, bodily searches), and the fifth amendment (immunity statutes and required records). As a result, the Court in the abortion decisions only absolutely barred state intervention during the first trimester; beyond that, the state's interests were more compelling and varying degrees of intervention were acceptable.[356] The Court most probably will continue to employ this balancing approach in any future applications of the right to privacy to new areas. Of course, the still unanswered question is whether the Court will only apply the composite right in matters pertaining to a "marital-sexual-familial privacy right."[357] It seems likely, given the increasing need to protect privacy, and the dangers that technology and growing governmental demands for information present, that the composite right will be applied in additional areas in the future.[358]

Hence, the real significance of the composite approach of *Griswold* and the recent abortion decisions is their establishment of the presump-

sively upon the ninth amendment, the Court was unwilling at that point in time to state definitively which of these theories it deemed most correct.

353. 410 U.S. at 152–53.

354. *Id.* at 153–54.

355. *See* Heymann and Barzelay, *The Forest and the Trees:* Roe v. Wade *and Its Critics,* 53 B.U.L. REV. 765, 775 (1973).

356. 410 U.S. at 154–55, 163–66.

357. *See* Note, *In Defense of Liberty: A Look at the Abortion Decisions,* 61 GEO. L.J. 1559, 1569 (1973), where it is argued that the Court will not extend the right to privacy beyond this realm.

358. For an effective discussion of the variety of cases being litigated in which the right to privacy is claimed, as well as some indications of future applications of the right in a variety of areas, *see* Note, *On Privacy: Constitutional Protection for Personal Liberty,* 48 N.Y.U.L. REV. 670 (1973). *But see* note 357 *supra.*

tion that individual privacy is so vital and fundamental a right that government must be amply prepared to justify any intrusions upon it. As such, these cases may be far more important than their substantive holdings; they firmly associate the idea of privacy with the Bill of Rights. This has two important effects on the right to privacy: first, it establishes privacy as a general right which is equally as crucial as the more familiar, explicitly stated protections of the Bill of Rights; and second, it justifies the Court's more vigorous and expansive utilization of the narrower rights of privacy protected by the individual amendments. Clearly, the bulk of future litigation on constitutional privacy will involve these individual protections rather than the composite right. But the two concepts of privacy must necessarily go together. As such, the Supreme Court has in hand a potent device to combat the inexorable pressures against individual and group privacy that the future will bring.